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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 537

ARMOUR AND COMPANY,

Petitioners,

versus

FORT MORGAN STEAMSHIP COMPANY,
CLAIMANTS
STEAMSHIP "FORT MORGAN," ET AL.,

Respondents.

Sirs:

Please Take Notice:

That upon a certified copy of the transcript of record herein, and upon the annexed petition of Armour and Company, I shall move before the Supreme Court of the United States, at the Capitol, in the City of Washington, on Monday, October sixth, 1924, at the opening of court on that day, or as soon thereafter as counsel can be heard, for a writ of *certiorari*, to be directed to the United States Circuit Court of Appeals for the Fifth Circuit, to bring before the above named Honorable Court the action referred to in said petition, for such proceeding therein as

to the said Supreme Court of the United States shall deem just.

Dated at New Orleans, July 10, 1924.

Yours respectfully,

JOHN D. GRACE,
of counsel for Petitioner.

JOHN D. & M. A. GRACE.

To:

DENEGRE, LEOVY AND CHAFFE,
Proctors for the Fort Morgan Steamship Company.

TERRIBERRY, RICE AND YOUNG,
Proctors for Central American Cattle Company.

Service accepted and copy of foregoing notice and petition for writ acknowledged this July 10th, 1924.

DENEGRE, LEOVY AND CHAFFE,

Proctors for the Fort Morgan Steamship Company.

TERRIBERRY, RICE AND YOUNG,
Proctors for Central American Cattle Company.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 537

ARMOUR AND COMPANY,

Petitioners,

versus

STEAMSHIP "FORT MORGAN"—FORT MORGAN STEAMSHIP COMPANY, CLAIMANTS

Respondents.

PETITION FOR WRIT OF *CERTIORARI.*

To the Honorables, the Justices of the Supreme Court of the United States:

The petition of Armour & Company, a corporation organized and existing under the laws of the State of Illinois, for a writ of *certiorari*, requiring the United States Circuit Court of Appeals for the Fifth Circuit to certify to the Supreme Court of the United States for its review and determination, the case of *Armour & Company v. Steamship "Fort Morgan,"* whereof the Fort Morgan Steamship Company is claimant as owner.

RESPECTFULLY REPRESENTS:

FIRST: That the sole question involved in this cause —a question of law—is one upon which the Circuit Court of Appeals for the Fifth Circuit is, in its judgment of the law, radically at variance with the judgment of the law of other Circuit Courts of Appeal, on the question of legal effect of bills of lading signed by the master of ocean going ships for the charterer, as will be presently shown. A question of prime importance to carriers by water and shippers on water craft employed in foreign and domestic commerce.

SECOND: The question presented is whether or not liability attaches to an ocean going passenger and freight ship for loss occasioned by crushing and smothering to death one-half of her cargo of cattle which were all shipped in good order and condition, on board of such steamship, which vessel was expressly warranted by her owners to be tight, staunch, strong, well equipped and seaworthy; which cargo of cattle was shipped under a received on board bill of lading, signed by the master of the ship, for the charterers of that ship, with said master and all her officers and crew being then and there the employees and agents of the owner of the ship; which ship, it is conclusively shown was not in fact in a seaworthy condition even while lying at her dock receiving on board said cattle; she being then and there radically deficient in necessary ballast and with part of her water ballast tanks damaged and unfit for use. So, by reason of said unseaworthiness and while at her loading dock, she commenced a slow gradual

list over to one side; which list became more marked when she lurched over several degrees more on the letting go of her mooring lines, which secured her to the dock, which list kept steadily turning the vessel over on her side, until finally, when at sea after a few hours sailing from port, she had listed, or turned over so far to one side her officers and crew refused to proceed further on the voyage, fearing for their lives. They turned the ship back to the port she had just left, and, on arriving there she was sounding signals of distress, a call for help, as she had so far listed over, she was then on the verge of capsizing, or completely turning over. Because of this most extraordinary list, which was due to grave unseaworthiness of the vessel, due to insufficient ballast and unserviceable water ballast tanks, the cattle stowed down in the hold of this ship were unable to maintain their footing, slipped to the decks, and there, over one-half of this cargo of 420 heads of cattle, were crushed, smothered to death, and jettisoned. This throwing of the dead cattle overboard, was not caused by a sea peril, but by the unseaworthy instability of the ship herself, caused through lack of sufficient ballast.

Nevertheless, the Circuit Court of Appeals for the Fifth Circuit, holds that the ship is not liable for any loss to the shippers of said cattle.

But other Circuit Courts of Appeal, and foreign and American authorities, as will be presently shown, hold that under just such circumstances the ship is liable for the full measure of damage.

Hence, in this regrettable conflict, and considering the importance of the question involved, which strikes at the very root of bills of lading, and other contracts for carriage of goods, this application for *certiorari* is presented.

THIRD: With all due deference to the Circuit Court of Appeals for the Fifth Circuit, it is respectfully suggested that that court is in error, and in direct conflict with other Circuit Courts of Appeal, as will be presently shown, in holding as follows; to-wit:—

> "As above shown, the bill of lading was subscribed by the Cattle Company only, 'by Tho. Johannsen, **master S/S Fort Morgan.**' That signature indicated the absence of intention to bind anyone but the charterer by the bill of lading. The act of the master in so subscribing the instrument, does not indicate a purpose thereby to bind the ship or its owner." (Tr. p. 471.)

But, directly opposed to the above holding, the United States Circuit Court of Appeals for the Second Circuit, with Judges Ward, Hough, and Manton, presiding, in The Esrom, 272 Fed. R. p. 269, after a most learned and exhaustive review of the authorities, says:

> "If the voyage is begun, the vessel must carry the goods to destination on the terms agreed by the shipper with the charterer; **for when the vessel starts upon the voyage, by implication, there is a ratification and adoption by the ship of the charterer's contract with the shipper.**"
>
> "* * * Before sailing, the vessel's owner is protected by his opportunity to refuse to carry the

goods on the terms agreed by the charterer before the voyage is commenced."

In the last quoted case it is further said:

> "The ship may be held liable *in rem* for damages to the cargo even though no bill of lading or contract of affreightment was signed by the master."

FOURTH: That the lower court is in direct conflict with other Circuit Courts of Appeal as will presently be shown, when it holds that:—

> "The appellant is not entitled to hold the ship or its owner liable for a breach of duty imposed by the contract for the carriage of the cattle, as appellants' contract for such carriage was with the charterer, the Cattle Company, alone." (Tr. p. 472.)

But that breach of duty referred to by the court was the unseaworthiness of the ship, itself, which was warranted by her owners to be tight, staunch, strong and seaworthy in every respect; a warranty, too, which is implied by law when not expressed.

Respecting this point the United States Circuit Court of Appeals, for the Second Circuit, before Judges Lacombe, Ward and Rogers, presiding, in the case of *Olsen v. United States Shipping Company* (213 Fed. R. pp. 20-21) held:

> "It would, in our opinion, be unwise and dangerous to impair the implied warranty of seaworthiness of the ship, herself. The district judge rightly held that the steamer was unseaworthy on leaving Ship Island. The jettison was caused not by sea peril, but by her own instability. It makes no differ-

> ence whether this was due to the amount of stowage of the deck load alone, or also to the fact that the largest ballast tank could not be filled. **All these matters were under the absolute control of the master and it was his duty to see that they were right.** * * *"

Other authorities are submitted in petitioners' brief, which, too, evidence the grave importance to the shipping world, of the question of law submitted herein.

FIFTH: Your petitioners, in accordance with Rule 37 of this Court, have filed a duly certified copy of the record of the said cause.

WHEREFORE, your petitioners respectfully pray that a writ of *certiorari* may issue out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding the said Court to certify and send to your Honorable Court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in the said case therein entitled, *Armour & Company, Appellants v. Fort Morgan Steamship Company, Ltd., et als, Appellees, Claimant, as* owner of the steamship *"Fort Morgan,"* numbered 4148 of the Docket of said Court, and that the said cause may be reviewed and determined by your Honorable Court, as provided in Section 6 of the Act of Congress, entitled "an act to establish Circuit Courts of Appeal and to define and regulate in certain cases the jurisdiction of the Courts of the United States and for other purposes," approved March 3, 1891, and Section 240 of the Judicial Code; and that your peti-

tioner may have such other or further relief or remedy in the premises as to Your Honors may seem appropriate and in conformity with the said act and code, and that the judgment of the said Circuit Court of Appeals in the said case, may be amended and due allowance made by your Honorable Court, to the end that there be no further reason for failure of those having it in their power to aid distressed vessels to withhold that prompt succor, so often necessary in the preservation of human life.

And your petitioners will ever pray.

ARMOUR AND COMPANY,
By Philip D. Armour,
Vice-President Armour & Company.

STATE OF ILLINOIS,
CITY OF CHICAGO.

Philip D. Armour, being first duly sworn according to law, deposes and says that he is qualified and has authority to act herein for the foregoing petitioners; that he has read over the foregoing petition and that the statements contained therein are true and correct to the best of his knowledge, information and belief. That Armour and Company, is a corporation.

(Seal) PHILIP D. ARMOUR.

Sworn to and subscribed before me this 8th day of July, 1924.

.....
Notary Public, Cook County, Illinois.
My commission expires

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924.

No. 537

ARMOUR & COMPANY,

Petitioners,

versus

STEAMSHIP "FORT MORGAN"—FORT MORGAN STEAMSHIP COMPANY,

Claimants-Respondents.

BRIEF FOR PETITIONERS.

Petitioners brought this suit solely and exclusively against the steamship "Fort Morgan," a common carrier, on a bill of lading signed by the master of that ship (Tr. pp. 29 and 30), which acknowledges **receipt on board,** at Port Limon, Costa Rica, of 420 head of live cattle, shipped by petitioner **in good order and condition** (Tr. p. 9), to be delivered **in like good order and condition** unto petitioner, at Jacksonville, Florida.

This suit was brought to recover of and from the said steamship "Fort Morgan," alone, the sum of $31,500.00 for and on account of death and damage happening on shipboard to said consignment, within a few hours after the departure of said steamship from said port, occasioned solely by reason of the gross unseaworthy condition of said vessel because of lack of sufficient ballast to safely navigate her.

Due to lack of necessary ballast and consequent instability of this vessel, she had a list of thirteen degrees when her mooring lines were let go (Tr. p. 396). As she proceeded on her voyage this list kept gradually increasing, as her master, Thom. Johannesen, says, "little by little" (Tr. 267), until after a few hours out from port she had so far listed to port her officers and crew refused to proceed any further, insisting that she be brought back to port (Tr. p. 281), which was done.

Concerning her condition when she arrived back at port of loading, sounding distress signals, her master, Thom. Johannesen, testified as follows (Tr. p. 276):

> Q. When your vessel got back to Port Limon, what was the degree of list she had?
>
> A. **Forty-five.**
>
> Q. Then she was practically at the point of capsizing, wasn't she?
>
> A. Yes, she could not stand no more. That is why we turned back.

This gross unseaworthy condition of that ship prevented the cattle from keeping on their feet, so they slid to the

deck and were crushed, causing the death of 218 head and grave injury to others which entailed heavy costs and expenses in caring for them at and in the neighborhood of the port of shipment, for recovery of all of said losses, this suit is brought.

THE LAW OF THE CASE

Showing a Decisive Marked Conflict Between the Circuit Court of Appeals for the Fifth Circuit and That of the Second Circuit and Other Courts.

Notwithstanding the foregoing, unparalleled unseaworthy condition of the steamship "Fort Morgan" before and at the time she entered upon her proposed voyage, which is admitted by the master of that ship, and otherwise abundantly proven, the lower courts dismissed petitioner's claim.

The Court of Appeals held herein as follows:

> "The appellant (petitioner herein) is not entitled to hold the ship or its owner liable for **a breach of duty** imposed by the contract for the carriage of the cattle, as appellant's contract for such carriage was with the charterer, the Cattle Company, alone," (Tr. p. 472).

Notwithstanding the fact that the "breach of duty" above referred to was a gross breach of duty by the carrier of obligations arising out of the mere fact that cargo is received on board for transportation, from which fact, alone, the law imposes upon the ship, the obligation of seaworthiness.

In the case of Olsen v. United States Shipping Company, 213 Fed. Rep., pp. 20-21, before the United States Circuit Court of Appeals, for the second circuit, with Circuit Judges Lacombe, Ward and Rogers presiding, the court pointed out that,

> **"It would, in our opinion, be unwise and dangerous to impair the implied warranty of seaworthiness of the ship herself."**

In The Esrom, 272 Fed. Rep., par. 1, p. 272, before the United States Circuit Court of Appeals for the second circuit, with Circuit Judges Ward, Hough and Manton, sitting, the court said:

> **"The obligations which are created one to the other, then, are that the ship is bound not to injure the merchandise by improper stowage or rough handling, and, if she does, then there will be a liability in rem. even before the voyage is begun. If the voyage is begun, the vessel must carry the goods to destination on the terms agreed by the shipper with the charterer; for when the vessel starts upon the voyage, by implication, there is a ratification and adoption by the ship of the charterer's contract with the shipper."**

The Circuit Court of Appeals for the fifth circuit, seeking support for its interpretation of the law, did, we submit, with all due deference, erroneously cite the case of The Poznan, 276 Fed. Rep. 432, (U. S. D. C.) since, in that case, it is a fact not only that no complaint whatever was urged against or found with the seaworthiness of that ship, but that question was in no way involved.

It appears in the case of the "Poznan" (cited erroneously by the C. C. A. for the 5th circuit) that, at the instance of her owners, the voyage of that vessel was broken up and she required to return to her port of loading—not because of any inability on the part of that vessel to proceed upon the voyage undertaken—as did exist in the case of the steamship "Fort Morgan"—but because her owners alleged they feared that due to the congested condition of the harbor of Havana, Cuba, at that time, to which port she was then bound, she would be held up an unreasonable length of time before she could get opportunity to discharge her cargo.

In the said case (Poznan) the court was called upon to determine what were the rights of holders of bills of lading **signed by the charter alone;** and here is what the court said (276 Fed. R. 432, before Judge Hand):

> "(12) **The last question is of the parties liable. First, of the ship.** The charter party did not provide that the master should sign the bills of lading; that clause in the printed form being struck out. By an addendum, it provided that the Acme Company should issue no bill of lading until the freight had been paid to the Polish Company. Thus the charter party clearly contemplated bills of lading running in the name of the Acme Company, and they all so read. Most of them were in fact signed by the Company, but a few by the master. **So far as concerns the ship,** it makes no difference. **Being once laden she was bound for right delivery though the charterers sign.** *The Euripides* (*D. C.*) 52 Fed. 161; *The Centurion* (*D. C.*) 57 Fed. 412;

> *The Freda* (*D. C.*) 266 Fed. 551. In *The Esrom* (*No.* 2) 272 Fed. 266 (*C. C. A. 2nd*), February 24, 1921, **it was agreed by all the judges that the charterer's bill of lading bound the ship for right delivery.** Indeed, **the cargo would have a 'privilege' against the ship for right delivery, even without any bill of lading.** *The Saturnus*, 250 Fed. 407, 162 C. C. A. 477, 3 A. L. R. 1187."

We respectfully submit that what is said in The Poznan, unequivocally fastens liability upon the ship, even in cases where the bill of lading be signed by the charterer, alone; and, in no way, manner, shape or form does it afford authority for the finding of the Circuit Court of Appeals in this case, although quoted by them in that erroneous belief.

So, also, the Circuit Court of Appeals in this case cite, as affording support for their interpretation of the law, Carver on Carriage of Goods by Sea (6th ed.), Sec. 158. While the author states the shipper, in such a case as that mentioned by him (which is not analogous with the petitioner's herein), must proceed against the charter, that author further says, in the very same section: "Though they might be able to proceed against the shipowner for acts done improperly by the master" (Citations). However, this proceeding *in rem* is not affected by proceedings *in personam.*

But, in this very same edition of Carver on Carriage of Goods by Sea, in Sec. 17, that author says:

> "And further, the shipowner remains responsible for loss or damage to the goods, however caused,

if the ship was not in a seaworthy condition when she commenced her voyage, and the loss would not have arisen but for that unseaworthiness."

So, we submit, with all due defference to the Circuit Court of Appeals, for the fifth circuit, their decision in this case stands without support from any authority, and is against the very citations given by them in support thereof.

Then, too, petitioner's suit is one *in rem.* against the steamship "Fort Morgan" to recover of and from that ship, alone, because of her own gross unseaworthiness due to her instability because of insufficient ballast. Whereof the master of that ship has testified (Tr. p. 293):

"IF THE SHIP HAD BEEN STRAIGHT WHEN LOADED THERE WOULD HAVE BEEN NO DANGER."

For the convenience of the court we set out here the two cases determined in the Circuit Court of Appeals for the second circuit, heard by different judges sitting on that court, making **five** judges concurring in the following case, which show an exhaustive review of the law on the points in question on which the second circuit is in **direct conflict** with the Circuit Court of Appeals for the fifth circuit. They are as follows:

AUTHORITIES ABOVE REFERRED TO.

In the case of *Olsen v. United States Shipping Company*, 213 Fed. Rep., pp. 20-21, before the United States

Circuit Court of Appeals, for the second circuit, with Circuit Judge Lacombe, Ward and Rogers presiding, the court held:

> "The consignee of the cargo at Aberdeen sued the ship owners for the value of the cargo jettisoned, who, in pursuance of correct legal advice, paid the claim. The District Judge allowed all these claims of the owners on the ground that they resulted from the improper loading, which was done by the charterer and which the charterer insisted did not affect the steamer's seaworthiness. This was, in our opinion, error. It is true that when charterers load cargo against the protest of the master, in such a way that it is itself damaged and/or damages other cargo the charterer will be liable. *The Centurion* (D. C.), 57 Fed. 412. Likewise, when cargo loaded on deck by agreement is lost because of a peril of the sea the ship will be excused. *Lawrence v. Minturn*, 17 How. 100, 15 L. Ed. 58. We are not willing to extend this to such a loading as makes the ship herself unseaworthy when no peril is encountered. **It would, in our opinion, be unwise and dangerous to impair the implied warranty of seaworthiness of the ship herself.** The District Judge rightly held that the steamer was unseaworthy on leaving Ship Island. The jettison was caused not by sea peril, but by her own instability. **It makes no difference whether this was due to the amount of the stowage of the deckload alone or also to the fact that the largest ballast tank could not be filled. All these matters were under the absolute control of the master and it was his duty to see that they were right. It was no excuse to him that the charterers did the loading;** insisted upon his taking

the deckload or that surveyors certified that the ship could do so safely. No doubt both thought so. That, however, did not lessen his duty, especially in view of the fact that he did not think so himself.

"The owners seek to sustain the decree on various grounds. They say that the warranty of seaworthiness was satisfied if the ship was seaworthy when the voyage began, which they say was at New Orleans, as she certainly was. **If this be admitted, it will be no excuse to the owners if the master subsequently made or allowed others to make the vessel unseaworthy.**

"Then they rely on such analogies as landsmen requiring builders or manufacturers with whom they contract to use certain material or follow certain construction which results in loss. Such relations have no resemblance to the relation of vessel and cargo or to the supreme authority of the master of a ship. There is no such warranty as that of seaworthiness and the builder or manufacturer has no such absolute authority or duty as has the master of a vessel.

"They rely also on Article 30 of the charter providing that the deckload shall be at the charterer's entire risk, **but this does not cover a risk caused by the unseaworthiness of the vessel.**

"Then they say that clause 9 in which the charterers indemnify the owners against any liability arising from the bill of lading entitles the owner to recover. But the bill of lading did not increase the liability of the owners under the charter party. Indeed, it restricted it. **The cargo did not belong to the charterers, and if it did, the owner's liabil-**

ity for unseaworthiness would be exactly the same.

"Finally, cases are cited in which charterers were owners *pro hac vice*, and therefore could not reclaim because of unseaworthiness caused by themselves. Obviously these have no application."

In *The Esrom*, 272 Fed. Rep., par. numbered 1, p. 269, before the United States Circuit Court of Appeals for the second circuit, with Circuit Judges Ward, Hough and Manton sitting, the Court said:

"The ship may be held liable *in rem.* for damages to the cargo, **even though no bill of lading or contract of affreightment was signed by the master.** A shipowner may be held to the common-law liability. In *Brower v. Water Witch*, Fed. Cas. No. 1971, affirmed 66 U. S. (1 Black), 494, 17 L. Ed. 155, it was held that where a shipment of cotton was damaged, even if no bill of lading or other agreement was entered into by the master, the receipt of the merchandise, by the vessel consenting to its being loaded for a port of destination, subjected the ship to liability; that the agents of the charterers in whose services the brig was at the time, and who were interested in procuring cargoes, and who entered into an agreement fixing the terms upon which the shipment was to be made, made the vessel bound by such agreement. The obligation is imposed as a common-law obligation of the carrier. In *The Euripides* (D. C.), 52 Fed. 161, it was said:

"'But the liability of the ship would be the same without any bill of lading. The original charterers undertook to transport these goods; this was done by the authority and consent of the shipowners, for such

was the very object of the charter. **The ship is therefore answerable for any negligence that causes damage to the goods, and is answerable to the shipper, or to his vendee, upon the implied contract to transfer safely, whether a bill of lading is issued or not.'**

"In the *Centurion* (D. C.), 57 Fed. 412, Judge Brown said:

> " **'The charter includes nothing that even by implication excludes the ordinary security of a lien in favor of the cargo against the ship for the performance of the ship's duties in the business for which she was chartered.** The ship is therefore liable for bad stowage, because the duty to stow properly is one of the duties of the carriage which the owner has expressly authorized. The Freeman v. Buckingham, 18 How. 182: Niagara v. Cordes, 21 How. 7. The ship is liable for damages from bad stowage, whether the stowage is done by the owners' agent **or the charterers', and equally so whether there is any bill of lading or not.** It was therefore immaterial whether the bill of lading was signed by the master or by the charterers.'

"In the case of *The Sprott* (D. C.), 70 Fed. 327, a steamer was held *in rem.* for damages to cargo which was carried on deck although the bills of lading were signed by the charterer. It was there said:

> " 'I do not think it is any defense to the ship that the bill of lading signed by the master recited the shipment of all the cargo as having been made by the charterers. The ship is not entitled to claim from that circumstance that it was dealing with the charterers alone, and had no privity with the actual shippers. For the master knew to the contrary. His own bill of lading recited the actual shippers, and he knew that the usual bill of lading had been given to those shippers on the ship's account. To suffer the ship, therefore, to deny any privity with the actual known shippers, under cover of a single bill of lading given to the charterers as sole shipper, would be to

> uphold a mere subterfuge, and a virtual fraud upon the shippers; since the ship's bills of lading were given to shippers with the mater's knowledge and concurrence, and on his account. The master, knowing that clean bills of lading had been given for the 163 bales, knew that the charterers had no authority to ship them on deck at shipper's risk. His own bill of lading to the charterers, with that exception inserted, is therefore, no protection to him or to the ship; and if he repudiates the bill of lading signed in his behalf by the charterers, as respects goods other than the charterers' goods, he is in the situation of a master who has received goods for transportation without giving any bill of lading for them at all; and upon that theory he would be bound to carry the goods in the customary manner; that is, under deck. The Delaware, 14 Wall. 579.'

"If negligence were proved, or fault shown, the Esrom would be responsible to the libelant independent of the form of contract of affreightment, or even though the bill of lading was not signed by the master.

"There were reciprocal liens between the Esrom and the cargo of prunes, which arose at the time the cargo was received on board and obligations were then imposed. In *Vandewater v. Mills*, 60 U. S. (19 How.) 82, 15 L. Ed. 554, it was said:

> " 'But this duty of the vessel, to the performance of which the law binds her by hypothecation, is to deliver the cargo at the time and place stipulated in the bill of lading or charter party, without injury or deterioration. If the cargo be not placed on board, it is not bound to the vessel, and the vessel cannot be in default for the non-delivery, in good order, of goods never received on board.'

"But the obligation between the ship and cargo is mutual and reciprocal, and does not attach until

the cargo is on board or in the custody of the master. *The Lady Franklin*, 75 U. S. (8 Wall.), 325, 19 L. Ed. 455; *Scott v. Ira Chaffee* (D. C.), 2 Fed. 401. This rule is not inconsistent with the authorities cited, which hold that the vessel's lien upon the cargo is subject to be defeated if, before the vessel breaks ground, she becomes unseaworthy or disabled and unable to finish her voyage. *Tornado*, 108 U. S. 342, 2 Sup. Ct. 746, 27 L. Ed. 747; *Eugene Viesta* (D. C.), 28 Fed. 762. But the lien of the vessel upon the goods and of the goods upon the vessel attaches from the moment the goods are laden on board, and not from the time only when the ship breaks ground. *Bird of Paradise*, 72 U. S. (5 Wall.), 545, 18 L. Ed. 662; *Bulkley v. Naumkeag Co.*, 65 U. S. (24 How.), 386, 16 L. Ed. 599.

"This Court said in *National Steam Nav. Co., Ltd., vs. International Paper Co.*, 241 Fed. 862, 154 C. C. A. 565:

> " 'The obligation of the ship to carry, and of the shipper to pay for the carriage, accrues when the goods are delivered to the ship.'

"The obligations which are created one to the other, then, are that the ship is bound not to injure the merchandise by improper stowage or rough handling, and, if she does, then there will be a liability *in rem.* even before the voyage is begun. If the voyage is begun, the vessel must carry the goods to destination on the terms agreed by the shipper with the charterer; for when the vessel starts upon the voyage, by implication, there is a ratification and adoption by the ship of the charterer's contract with the shipper. Then the shipper is deprived of an opportunity to retake

> his goods, and the goods are in the sole possession and control of the ship. So, too, the ship is then bound by the charterer's bill of lading, under which the freight is prepaid, and cannot collect further freight at destination. *The Ada* (D. C.), 233 Fed. 325. Before sailing, the vessel owner is protected by his opportunity to refuse to carry the goods on the terms agreed by the characterer before the voyage is commenced."

Judge Ward filed a dissenting opinion in the above case, contending that the ship's liability was even greater than that announced in the majority opinion. So, as stated in *The Poznan* (276 Fed. R., par. 12, p. 432),

> **"it was agreed by all the judges that the CHARTERER'S BILL OF LADING BOUND THE SHIP."**

In the foregoing case application for writ of *certiorari* was made to the Honorable the United States Supreme Court, and writ denied, 257 U. S. 634; 66 L. Ed. 408.

No matter what further citations we might set out here, it would not be possible to strengthen the already strong, decisive, unequivocal declarations contained in the above quoted decisions of the United States Circuit Court of Appeals for the second circuit, which refuse to permit common carriers of passengers and merchandise, by water, to evade their just liability in placing in service vessels in such an unseaworthy condition as to prove a grave menace to human life and property, and justly hold the ship responsible *in rem.* for its own instability, weakness and

vices, rendering her unseaworthy and unfit for the voyage undertaken.

Because of the manifest importance of a correct settled rule of law, in view of the directly opposed holdings of the Circuit Courts of Appeal for the second and fifth circuits, a determinate definite uniform rule, such as only your Honors can establish, we pray your Honors to grant a writ of *certiorari*, as by the petition prayed for, that shippers and carriers by water may know their just rights and obligations when unseaworthy vessels are put in service to undertake a transportation service for which they are absolutely unfit, operating to the serious damage of shippers.

Respectfully submitted,

JOHN D. GRACE,
M. A. GRACE,
EDWIN H. GRACE,
Attorneys for Petitioners.

I hereby certify that I have examined the petition in this cause, and am familiar with the facts in this case, and that in my opinion the said petition is well founded and that the cause is one in which the prayer of the petition should be granted by this Honorable Court.

JOHN D. GRACE.

(13)

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925.

No. [redacted]135

ARMOUR & COMPANY,

Petitioners,

versus

FORT MORGAN STEAMSHIP COMPANY, LTD., (CLAIMANTS AS OWNERS OF THE STEAMSHIP "FORT MORGAN"); THE AMERICAN SURETY COMPANY OF NEW YORK; AND THE CENTRAL AMERICAN CATTLE CO.,

Defendants.

On Writ of Certiorari to the United States Circuit Court of Appeals, for the Fifth Circuit, from their Final Judgment Rendered March 18, 1924, Affirming the Judgment of the Lower Court.

JOHN D., M. A. & EDWIN H. GRACE,
Attorneys for Petitioners.

MONTGOMERY-ANDREE PRINTING CO. INC., 907 CHARTRES, N. O.

SUBJECT INDEX.

Parties to the Suit.

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Although five different persons or corporations are named in the record there are only three parties to the suit: Libelant, Armour & Company; the steamship "Fort Morgan" with the Fort Morgan Steamship Company, claimant thereof, and the Central American Cattle Company, Inc. 2-5

Statement of Facts.

The primary question presented is whether or not liability attaches to an ocean-going passenger and freight steamship for loss occasioned by the crushing and smothering to death of one-half of her cargo of cattle, because of a condition of gross unseaworthiness existing in that vessel prior to and at the time of the commencement of her voyage..... 5-6

The Fort Morgan Steamship Company, Inc., admit the shipment of the cattle at the port and for the destination stated by libelant; admit a listed condition of the ship at the dock while taking on cargo; admit a continual list of this ship, to such extent, that within a few hours after leaving port the voyage was abandoned and vessel returned, blowing signals of distress and in a situation of grave danger of turning over; but they contend that the Central American Cattle Company, Inc., was responsible for this condition, and brought them in by petition and prayed for judgment over against that company if libelant should prevail. They also contend, without reason, that

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the shipper, too, was responsible for the condition of that vessel 7-8

The Central American Cattle Company, Inc., called in by claimant of the S/S "Fort Morgan," as co-defendant, admits the shipment of the cattle by Armour & Company; admits the unseaworthy condition of that ship and admits the crushing, killing and maiming of the greater part of the cargo shipped by libelant. They admit they were charterers of the ship, but deny that they were responsible for any of the damages, and deny that they should be made responsible over to the owners of the ship 9-10

Pleadings and Evidence.

The facts in the case as disclosed in the pleading and evidence are discussed under different headings, as follows:

The Bill of Lading.

The bill of lading provides for the carrier's responsibility, as a carrier to attach when the goods are actually loaded for transportation.. 10-11

It was only after such loading libelant's shipment of cattle was damaged as complained of. The bill of lading was executed by the Master of the steamship "*Fort Morgan*" after he personally had received and counted the number of heads of cattle delivered on shipboard.... 11

Authority of the Master to execute bills of lading, as required by the charterer, is specially provided for in the charter..... 12

The bill of lading contains all the usual stipulations and conditions ordinarily found in the

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usual form issued by common carriers. Respondent invoked agreement in bill of lading relating to subrogation of insurance on cargo; but as the loss arose from unseaworthiness, only, of the "*Fort Morgan*" and no insurance was effected on such character of loss, none became payable 12-13

The bill of lading refers to a live stock agreement—Principal matters which are set out in the live stock agreement.....14-15

The Charter Party Under Which the Steamship Fort Morgan Was Operated and Special Orders to the Master Thereon.

The charter party was made in a common form of charter party, and it provides that the owners shall appoint and pay the captain, officers and crew of the vessel, also for all engine room and deck stores and their insurance, and to maintain her in a thoroughly efficient state.....15-16

It still further provides that the vessel shall be employed in carrying lawful merchandise, including petroleum or its products, in cases, and passengers, so far as accommodations will allow 16

That the Captain, although appointed by the owners, shall be under the orders and direction of the charterers as regards employment, agency or other arrangements; and that the charterers are bound to indemnify the owners from all consequences or liability that may arise from the Captain signing bills of lading, or otherwise complying with their orders or directions....16-17

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With regard to ports between which this vessel could be engaged to ply it provides for employment between safe ports of the United States of America, West Indies, Gulf of Mexico, Carribean Sea, Central or South America, "as the charterers or their agents shall direct".. 17

Master's Instructions From Owners In Re Following Charterer's Orders.

The Master testified he had instructions from the owners to follow the *Central American Cattle Co., Inc.*, orders. This testimony was given in the presence of the President of the corporation owning the *"Fort Morgan,"* Mr. Burge, who subsequently took the stand and did not deny this testimony..... 17

The Unseaworthiness of the S/S "Fort Morgan" at the Time When She Received Libelant's Goods For Sea Transportation and the Cause of Such Unseaworthiness.

The libel alleges, and the answers of the Fort Morgan Steamship Company, Ltd., and the Central American Cattle Co., Inc., admit that when the "Fort Morgan" commenced her voyage she had a list, which subsequently increased, until within a short time thereafter her voyage was abandoned and she put back to port sounding signals of distress, calling for help, and in a condition which threatend to capsize the vessel, she then having a list of forty-five degrees 18

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The Master of the "Fort Morgan" (Johannesen) testified "if the ship had been straight when loaded there would have been no danger".... 19

Libelant's agent, Mitchell, asked the Captain about the list the "Fort Morgan" had while that vessel was being loaded and was assured the list did not amount to anything and that the vessel would straighten up when she got out to sea.....19-20

Testimony of the Master that from the time the "Fort Morgan" left her dock until she returned she was continually going over gradually to port, and shortly thereafter returned with a list of about forty-five degrees on the verge of capsizing 20

Cause of Unseaworthy Condition of the S/S "Fort Morgan."

The S/S "Fort Morgan," by her charter, was represented to be a water ballast ship (but, as shown hereafter, her tanks were not in good order or vessel with necessary water ballast to make her seaworthy)..... 20

The libel alleges that even before the S/S "Fort Morgan" commenced her voyage, as well as at the time of the commencement thereof, her forepeak tank was empty, that other tanks (ballast tanks) could be only partly filled because of leaky condition therein, that the afterpeak tank was empty, not in condition to be used for water. That water for boiler use, and for use of cattle, as well as for ship's general use, was taken from water ballast tanks,

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reducing the weight of water carried below the ship's water line..... 21

The Central American Cattle Co., Inc., admitted all the foregoing averment in the libel as being true 21-22

Fort Morgan Steamship Company admitted them in part and in part denied the averments (discussed at page 26)..... 22

Surveyor's Report on Unseaworthiness of the S/S Fort Morgan.

Underwriters Surveyors' report on the condition and availability of the water tanks of the "Fort Morgan" and the cause for the instability and unseaworthiness of the S/S "Fort Morgan" is set out in full at.....22-26

The surveyors refer to important information furnished them by the Chief Officer and the Chief Engineer of the S/S "Fort Morgan," which shows unseaworthiness in said vessel.. 24

The Fort Morgan Steamship Company insisted that the forepeak tank referred to in the libel was a small tank built into the ship for the purpose of supplying the boiler, and that it was properly used for that purpose; and that the afterpeak tank could have been filled but was not used, and that failure to use it was of no importance 26

But the surveyors in their report, above referred to, state that while the capacity of the forepeak tank and of the afterpeak tank amounted to thirty-five tons of water, they further report that the condition of the tanks, according to

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statements of the Chief Officer and Chief Engineer of that vessel, was, when she sailed, as follows: "Forepeak tank empty, afterpeak tank empty, not in condition to be used for water" 26-27

Neither the ship's Engineer or Chief Officer were ever called by respondents as witnesses in this case and no good or sufficient reason given for the absence thereof..... 27

The Master, alone, was the only witness produced of all the officers and crew of that vessel 27

The Master admitted that the boiler water used for steam purpose was taken out of the bottom tanks—the ballast tanks. That water used to water the cattle was also taken from the ballast tanks, thus depleting her ballast. So, it is just as the Master of the steamship "Fort Morgan" testified: "If the ship had been straight when loaded there would have been no danger".... 27-28

The Captain's testimony is quoted, showing that in taking water out of the ballast tanks, whether for boiler or steaming purposes, or for watering the cattle, that this was a taking out of ballast weight from the bottom of the ship; and the more weight taken from the bottom of the ship, the more tender she becomes and the more liable she is to roll over..... 28

That he knew it was his business to keep the vessel straight 29

Radiograms offered in evidence by libelant, which passed between the President of the owners of

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the steamship "Fort Morgan" at New Orleans, and the Master of the S/S "Fort Morgan," lying at Port Limon, wherein the president of the owning company inquired: "Advise if cattle properly loaded, also what caused accident and when will sail." That the Master responded "all cattle properly loaded, disaster caused by ballast tanks and heavy seas." The alleged heavy sea a myth, but, at most, would be only a concurrent cause..... 29

The Fort Morgan Steamship Company Failed to Produce the Ship's Official Log or Her Deck Scrap Log, or Her Engineer's Log.

The Master admitted he could see the sea from his landing as long as it was daylight or twilight, that he was looking down on the beach and on the key, "But I couldn't notice anything more—anything serious" 30

It is not pretended that any unusual or even ordinary storm or bad weather prevailed, but it is urged that a ground swell, coupled with lack of sufficient water ballast, caused the heavy listing of the ship. Libelants deny that there was any unusual ground swell, anything more than what is to be always experienced along the seashore, and submit that the alleged ground swell, at most, is put forward only as a concurrent cause—the other cause being unseaworthiness of the ship due to lack of sufficient water ballast resulting from leaky and unsuitable condition of some of the tanks and the taking out of her water ballast for steaming purposes and the watering of the cattle in her cargo.....30-32

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Although no one of the different logs kept on the S/S "Fort Morgan" were produced it appears from a superficial survey report made at New Orleans that the surveyor had access to the ship's official log, and quoting therefrom in his report, says, that while this vessel lay at the wharf at Port Limon she had a list to port of seven degrees. After letting go moorings she listed over to thirteen degrees. When she got outside of Port Limon in a heavy swell she listed over to thirty-eight degrees and the Master considering the danger returned to Port Limon. The Master admitted that on her return to port she had a list of forty-five degrees and was on the verge of capsizing (Tr., p. 276) 31-32

On trip from New Orleans to Port Limon, going for the cattle in question, sixty tons of water was used from double bottom tanks—water ballast tanks 32

Not only did the Fort Morgan Steamship Company fail to produce the Chief Officer and/or the Chief Engineer who volunteered the information set out in the official survey held at Port Limon, a copy of which was served on the Master within a few days of the time after the disaster, but the Master of the steamship testifying nearly a year and a half after the disaster stated he did not know where the engineer was—"He may be on the ship yet, I can't say" 33-34

And the statement of one of the proctors for libelant that they had made efforts to locate these men fails to show what was the nature or char-

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acter of efforts and when and how made, or why it was not secured while those officers were still in the service of that ship. The Court having repeatedly announced its opinion of a litigant who might have taken the testimony of important witnesses, officers and the crew of their vessel and no good or sufficient reason given why it was not taken, we are omitting citations on the point with respect to the inference that may be raised thereby..... 34

Construction of the Cattle Fittings. By Whom Made and Their Sufficiency.

At the instance, and by the efforts of the Fort Morgan Steamship Company, there was brought into this case a contract which had been entered into between Armour & Company and the Central American Cattle Company. But that contract specifically provides that the Central American Cattle Company would attend to the suitable equipment of the steamers, which they would furnish for the ocean transportation of libelant's cattle, all of which was to be done by and at the sole cost, charge and expense of the said American Cattle Company, Inc., to the full satisfaction of the Master of the ship and such insurance representatives who might be concerned.....34-35

In the Fourth Article of the libel it is specifically alleged that the said cattle were all safely placed on board of said vessel; were properly stowed and tied to make the voyage without danger to them, and would have safely made

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the same voyage but for the unseaworthy condition of the said vessel..... 35

The Central American Cattle Company, Inc., brought in as a co-defendant by the Fort Morgan Steamship Company, in their answer to this Article, admit that, "The allegations of the Fourth Article of the libel are admitted to be true" 35

The Fort Morgan Steamship Company deny that the vessel was in an unseaworthy condition, and, although the Master testifies, and his radiograms show, that the cattle were all properly loaded, claimant professed in its answer not to know whether the cattle were properly loaded or not.....35-36

Not only was the ship chartered as a general carrier of goods and merchandise to a cattle company, but on previous occasions operated solely for her owners' account, had carried five hundred fifty heads of cattle (seventy more than she had for libelant), and the Master says that the owners, of course, knew of those services 36

That the ship carried at different times, four cargoes of bananas, a cargo of cattle prior to the last one and several cargoes of corn and hogs on deck to Havana from New Orleans; sugar from Cuban ports and lumber trips with the lumber laden on deck..... 36

It is also shown that the President of the company owning the "Fort Morgan" sent on board or knew that there was delivered on board at

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the City of New Orleans a quantity of lumber to be used for constructing the cattle fittings for the particular voyage under consideration, and his wireless to the Master after the disaster occurred was "Advise if cattle properly loaded" 37

In addition thereto stands the Master's uncontradicted testimony given in the presence of the President of the Company owning the "Fort Morgan," who succeeded the Master as a witness, stating that he was advised by the said ship owners to follow the Central American Cattle Company, Inc., orders. All of which libelant respectfully submits most conclusively shows that the contention of the Fort Morgan Steamship Company that the ship was not intended to carry cattle is without merit..... 37

Notwithstanding averments of the Fort Morgan Steamship Company that libelant was obligated to and participated in the construction of the cattle fittings there is not in this record any credible testimony which justifies any such declaration. But the cattle pens were not only properly constructed, but were erected with the approval, sanction and actual participation therein of the Master of the steamship.. 38

Testimony of Captain Johannesen, Master of the steamship "Fort Morgan" is set out at a material length in this brief, which shows that he looked after everything in respect to the cattle fittings, which he deemed necessary for the safety of the ship. That he would not permit anything to be done that he thought would not

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be safe or proper. That what was done met with his approval, that he approved the way these cattle pens were built and approved of the way the cattle were loaded on board. That any changes he wanted made, and any change he wanted done, no matter what it was, they were always willing and ready to do it as he wanted.....38-39

The Master of the steamship "Fort Morgan" admitted that he reported to the Port Captain, at Port Limon, that the cattle was properly stowed and tied to make the voyage without any danger 39

Mr. Edward Mitchell, Agent for libelant at Port Limon, testifies that Armour & Company did not through him, nor through anyone else, supervise, direct or exercise any control over the putting up of the fittings. That a Mr. Wilkerson, whose services would begin as supercargo when the "Fort Morgan" would leave on the voyage accepted employment under the Central American Cattle Company, to aid in constructing these fittings because of the scarcity of labor, but that Armour & Company had nothing whatever to do therewith..... 40

However the testimony fully and completely shows that the fittings were properly constructed, that the Master saw to it that they did not interfere with the safety of the ship and that they were just as useful for the purpose of stowing the cattle as dunnage would be for stowing other cargo with the intention of keeping the cargo in its place and preventing any shifting thereof..... 41

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Measure of Damages.

The American Cattle Company entered into two severable, distinct obligations which were set out in a certain contract. Under the terms thereof the cattle company agreed to sell and deliver F. O. B. the steamship certain description of cattle at five cents per pound; libelant to have its representative there to accept the said cattle F. O. B. the steamer. On this particular occasion libelant's agent, Mr. Mitchell, issued a written receipt and accepted from the Cattle Company the four hundred twenty (420) head of cattle F. O. B. the steamer "Fort Morgan," weighing three hundred forty-six thousand three hundred two (346,302) lbs..... 41

The American Consul's health certificate shows that on the same day Mitchell, as agent for Armour & Company, made affidavit that Armour & Company were the owners of said cattle 42

The bill of lading issued to libelant stipulates that the carrier will not be liable for more than the invoice value of the goods..... 42

Mr. Kirk, one of the attorneys of a legal staff of Armour & Company, having personal knowledge of the money paid out by libelant, testified that as a result of the disaster complained of, Armour & Company has actually paid out on account of the cattle loaded on the steamer after allowing credit for the fifty that were saved, the sum of seventeen thousand fifty-one dollars and ninety cents ($17,051.91)..... 42

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That the actual expenditures by Armour & Company on account of those four hundred twenty head of cattle above mentioned does not include any expense by their men in Central America or any other expenses at all other than what libelant actually paid the Central American Cattle Company 42

The measure of damages sustained by libelant and how arrived at are set out at.....43-44

After the "Fort Morgan" returned and had for the purpose of saving herself, as much as anything else, discharged live cattle and had jettisoned over two hundred head of cattle. The live cattle was taken charge of by the Port Captain "for the account of whom it might concern," as the ship had voluntarily broken up its own voyage and failed to deliver the cattle as required 45

As there was no one else to aid in the matter, the Central American Cattle Company and Armour & Company furnished the money to purchase supplies, secured labor and use of pastures. The expenses incurred therein as far as kept by libelant, are set out..... 43

The libel sets up a claim for the market value of such cattle at Jacksonville, Fla., but in computing the damages herein they have taken, as stipulated in the bill of lading, the invoice value F. O. B. the steamer at Port Limon.... 45

So, also, through error, arising from assumption by counsel that the freight had been paid, freight money at the rate of twenty-five dol-

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lars per head is claimed in the libel. But, as a matter of fact, the freight has not been paid and, therefore, claim therefor is not pressed.. 45

It appears that in arranging settlement for the value of the cattle and considering certain other advantages Armour & Company paid to the Central American Cattle Company nineteen thousand dollars ($19,000.00). But the claim against the steamship "Fort Morgan" sought in this action, is for the invoice price, the liability stipulated in the bill of lading which puts up seventeen thousand three hundred fifty dollars ($17,350.00)..... 46

In Re Respondent's Contention That Because of the Existence of a Contract Between Armour & Company and the Central American Cattle Company, Stipulating for Two Distinct, Separate, Severable Obligations, One of Which Was Purely and Simply for Sale of Cattle F. O. B. a Steamer, the Other of Which Was Purely and Simply for the Ocean Transportation of Such Cattle as Vendee's Property, and Providing for Vendee to Make Payment of Ocean Freight; That Such a Contract Bars This Suit, in Admiralty, Although Brought, Not on That Contract, But on a Bill of Lading Issued to Libelant at the Port of Laden as a Shipper of Said Cattle Destined for Delivery to Libelant at Jacksonville, Fla., a Bill Which Was Executed by the Master of the Ship on Shipboard, and on Shipboard Delivered to Libelant's Agent.

Libelant submits that the long-settled law, a few leading cases of which is cited in this brief,

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conclusively shows that the libelant is not barred from proceeding directly against the ship, notwithstanding the fact that the charterer, too, may have stipulated for ocean transportation. That the acceptance of the cattle on board by the Master of the ship and undertaking to transport them did then and there create a liability on the part of the ship, which stands separate and distinct from any contract that the charterer may have made, with citation of authority.....47-51

Respecting the further contention by the Fort Morgan Steamship Company that a settlement of a certain suit brought by the Central American Cattle Company against libelant, to secure payment of the agreed price of the cattle shipped F.O.B. that steamer, etc., and making of a contract between the parties for further business, should bar this suit against the steamship "Fort Morgan," even though none of the rights, titles, interest or obligations of the steamship "Fort Morgan" were directly or indirectly touched upon, and to which contract the said steamship "Fort Morgan," nor her owners, were in any way necessary or proper parties or privies, is, we respectfully submit, a wholly unwarranted interjection into this case of issues manifestly not belonging to it.....51-52

Further, the Central American Cattle Company, that stands impleaded at the instance of the Fort Morgan Steamship Company, does not plead or set up by way of avoidance, or complain that this new contract referred to did in

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any way directly, or indirectly, relieve it from any obligation that it might owe to the Fort Morgan Steamship Company, whether direct or arising out of a recovery by libelant in this cause 52

LAW.

Decisions are submitted of cases, exhaustively considering all leading cases, by the United States Circuit Court of Appeals, which are directly in line with libelant's contention in this cause, and are positively directly opposed to the decision of the Circuit Court of Appeals below, which passed on this case. That those decisions completely show by citation of authorities from this Honorable Court and from other Courts of high jurisdiction that "it would in our opinion be unwise and dangerous to impair the implied warranty of seaworthiness of the ship herself"..... 54

Have held still further, in case of an unseaworthy condition, that "It makes no difference whether this was due to the amount of the stowage of the deck load alone or also to the fact that the largest ballast tank could not be filled. All these matters were under the absolute control of the Master and it was his duty to see that they were right. It was no excuse to him that the charterers did the loading," etc..... 54

In the case of the Esrom, which is quoted at length in this brief, there is reviewed a great many decisions, including decisions of this Honorable Court. That Circuit Court of Appeals (2nd Circuit), having practically exhausted the law

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on the subject, it was determined in that case that the ship may be held liable *in rem* for damages to the cargo, even though no bill of lading or contract of afreightment was signed by the Master. That the obligation is imposed upon the ship by law. That the liability of the ship is the same without any bill of lading. That the charter, in that case (as in this case) includes nothing that even by implication excludes the ordinary security of a lien in favor of the cargo against the ship for the performance of the ship's duties in the business for which she is chartered.....56-57

That it is no defense to the ship that a bill of lading signed by the Master reciting the shipment of all the cargo as having been made by the charterer. That it was still further held that, the obligations which are created, one to the other, then, are that the ship is bound not to injure the merchandise by improper stowage or rough handling and, if she does, then there will be a liability *in rem* even before the voyage is begun. If the voyage is begun the vessel must carry the goods to destination on the terms agreed by the shipper with the charterer; for when the vessel starts upon the voyage by implication, there is a ratification and addition by the ship of the charterer's contract with the shipper.....56-60

In still another cause considered by that Circuit Court of Appeals, the Court said even if a case of improper loading had been made out, it

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would only prove that the masters were negligent in permitting the coal to be so loaded, and the owners of the ship would be responsible, as the negligence of their agents (masters) would be imputable to them. It was further held "that the manner of loading was under the absolute control of the master and that it was his duty to see that the cargo was properly loaded, and that it was no excuse to him that the charterers insisted on loading in an improper manner" 61

Libelant further cites cases of this Honorable Court to show that in a case of a nature similar to this "the burden of proving seaworthiness at the beginning of the voyage rests with the ship owner" 63-66

We further cite authority to show that where the cause of the consumption of coal or water which may be stowed below the center of gravity that as these things are consumed the tendency to become top heavy increases; hence, that such a practice is dangerous to the lives of those on shipboard as well as to property of third innocent parties 62-63

In addition to the decisions quoted from at large in this brief of the nature referred to above, libelant quote at length Carver's Carriage of Goods by Sea, with respect to the obligations of the ship and her owners under clauses in the charter party directing that the Master shall sign bills of lading as the charterer may request, etc. 67-69

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But after all it is an indisputable fact that the cargo was lost solely and exclusively by reason of the unstable, unseaworthy condition of the ship prior to and at the time of the commencement of the voyage. A condition due to the failure of the Master of the ship in his duty to keep the ship in proper seaworthy condition for sailing 69

Finally, under the authorities submitted, it is shown that: "The ship, however, would be answerable for any negligence that caused damage to the cargo after its shipment on board; that is to say, it would be answerable to the shipper upon the implied contract to transport safely, and that there should be no unreasonable delay in commencing and prosecuting the voyage after the cargo had been received by the vessel. 1 Pritch. Adm. Dig., p. 492, Sec. 223; The T. A. Goddard (D. C.), 12 Fed., 174; The Euripides (D. C.), 52 Fed., 161. And 'a person whose goods are transported by contract with a charterer, in a chartered vessel, navigated by her owners, is not limited, in case of loss or injury to his goods, to his remedy against the charterer on the express contract with him, but may directly pursue the vessel or her owners, who have caused the loss. The T. A. Goddard, supra; New Jersey Steam Nav. Co. v. Merchants' Bank (6 How., 344, 12 L. Ed., 465).'" The Hiram, 101 Fed. Rep., 138, at pp. 140-141. See also The Water Witch, 19 How. Pr. 241, affd. in 1 Black, 494; The Peytona, 2 Curt., 21, 27..... 50

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Ada (The), 233 Fed., 325 60

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925.

No. 537

ARMOUR & COMPANY,

Petitioners,

versus

FORT MORGAN STEAMSHIP COMPANY, LTD., (CLAIMANTS AS OWNERS OF THE STEAMSHIP "FORT MORGAN"); THE AMERICAN SURETY COMPANY OF NEW YORK; AND THE CENTRAL AMERICAN CATTLE CO.,

Defendants.

On Writ of Certiorari to the United States Circuit Court of Appeals, for the Fifth Circuit, from their Final Judgment Rendered March 18, 1924, Affirming the Judgment of the Lower Court.

PARTIES TO THE SUIT.

The following preliminary statement will facilitate the Court in understanding the interests of the respective parties to the suit.

FIRST: THE LIBELANTS: ARMOUR & COMPANY, a corporation, shipper of cattle on the steamship "FORT MORGAN", instituted this suit by filing a libel in admiralty solely and exclusively against that steamship, thus making her defendant as a "personified entity", and seeking to hold her responsible for her own gross unseaworthy condition, which alone resulted in damages to libelant complained of herein.

SECOND: THE SAID STEAMSHIP "FORT MORGAN". As above stated, this vessel, alone, was proceeded against herein by libelant. She was operated as a common carrier. This suit against her is brought on a bill of lading executed by her master for 420 head of cattle received on board, of which cattle, while on board, practically one-half the number were crushed and killed, as a result of the rank unseaworthiness of this vessel.

THIRD: THE FORT MORGAN STEAMSHIP COMPANY, LTD., is claimant herein as owner of the said steamship proceeded against, and, on her behalf they furnished a release bond, took possession of the ship and as such claimants are defending this case in her behalf.

FOURTH: THE GULF COAST PLANTATION COMPANY: This company is not, by any pleadings, directly before the Court; but, in the second article of the answer filed by claimant (the above named Fort Morgan Steamship Company, Ltd.,) it is alleged (Tr., pp. 56-57), that the said steamship was under charter to the Gulf Coast Plantation Company, and by that company was subchartered without authority unto the Central American Cattle Company, Inc., and said

claimants filed, in connection with said answer, a copy of the charter to which they refer. But, libelants established as a fact, by the testimony of Robert T. Burge, President of the Gulf Coast Plantation Company (Tr., pp. 361-362), without contradiction, that the said Gulf Coast Plantation Company held the stock of the Fort Morgan Steamship Company; and that the Gulf Coast Plantation Company was really the owner of the steamship "Fort Morgan." These facts being conclusively established, the pretense set up in the name of the Fort Morgan Steamship Company that the charter of said steamship to the Central American Cattle Company, Inc., was a non-authorized act, was abandoned in the District Court by the Fort Morgan Steamship Company, claimants herein. Hence, in so far as this Court is concerned, the Fort Morgan Steamship Company, Ltd., and the Gulf Coast Plantation Company, may be considered as one and the same party.

FIFTH: THE CENTRAL AMERICAN CATTLE COMPANY, INC.: This company was impleaded herein by the Fort Morgan Steamship Company. The steamship "Fort Morgan" was under charter to it, (See charter, Tr. pp. 70-78), for transportation of passengers and all lawful goods and merchandise, including, also, among other things, provision for quarantine conditions, etc., *if fruit also should be carried*, which was not done in this case. Because of quarantine conditions in respect to the fruit trade, etc., this form of charter is styled "West India Fruit Trade": but it also contains provisions to make it cover transportation of all lawful goods and passengers on voyages between North, Central and

South American ports, as the said charterers may elect. The said Central American Cattle Company, Inc., was impleaded by the Fort Morgan Steamship Company, Ltd., Claimants, who contend that the said Central American Cattle Company made the steamship "Fort Morgan" unseaworthy before her voyage commenced, and in their answer, (Tr. p. 69), pray:—

> "* * * that the Central American Cattle Company may be made party defendant to this suit, and such decree rendered as between it and libelants as law and justice may require, and that if any decree whatsoever be rendered in favor of libelants against this respondent, against which it protests, that the same decree, with all costs, interests and expenses of every kind be rendered in respondent's favor as against said Central American Cattle Company, Inc."

SIXTH: The above-mentioned Central American Cattle Company, Inc., not only came into Court and filed answer to claimant's proceedings for a judgment over, against it, etc., and admitted the unseaworthiness of the steamship "Fort Morgan", as claimed by libelant, but denied liability for the damages resulting therefrom. They also filed an intervention wherein they sought to recover back certain charter money payments, collected by the said Fort Morgan Steamship Company, Ltd., when that vessel was, in fact, off charter (Tr., p. 426). This matter was finally settled between the said parties and said intervention stands discontinued (Tr. p. 432).

SEVENTH. Another intervention appears in the record, brought by P. G. Jansen, against the steamship "Fort Morgan", to recover because of certain

services and expenses rendered that vessel (Tr. p. 433). None of those things have anything to do with this case. Moreover, that claim was settled and the said intervention discontinued (Tr. p. 436).

So there are now only *three separate parties* before the Court:—

1. Libelant—Armour & Company.
2. Claimant—The Fort Morgan Steamship Company.
3. Time Charterer—The Central American Cattle Company, Inc., impleaded by Claimants as a co-defendant against whom they seek judgment over.

STATEMENT OF FACTS.

The primary and all important question involved in this cause—a question of law—is one upon which the Circuit Court of Appeals for the Fifth Circuit is, in its judgment of the law, radically at variance with the judgment of the law of other Circuit Courts of Appeal on the question of legal effect of bills of lading signed by the master of ocean going ships, for the charterer, as will be presently shown.

The question presented is whether or not liability attaches to an ocean-going passenger and freight ship for loss occasioned by the crushing and smothering to death of one-half of her cargo of cattle, which were all shipped in good order and condition, on board of such steamship, a vessel expressly warranted by her owners to be tight, staunch, strong, water-ballasted, well equipped and seaworthy; which cargo of cattle was

shipped by libelant, who was given a bill of lading signed by the master of the ship, for the charterers of that ship. The said master and all her officers and crew being then and there at the time of the acceptance of said cargo on board the said steamship, the employees and agents of the owner and officers and crew of the ship; which ship, it is conclusively shown, was not in fact in a seaworthy condition even while lying at her dock receiving on board said cattle; she being then and there radically deficient in necessary ballast, and with part of her water ballast tanks damaged and unfit for use. So, by reason of said unseaworthiness and while at her loading dock, she commenced a slow, gradual list over to one side; which list became more marked when her mooring lines to the dock were let go, she taking a lurch and going still further over several degrees. This list kept steadily turning the vessel over on her side, until finally, when at sea, after a few hours sailing from port, she had listed, or turned over, so far to one side her officers and crew refused to proceed further on the voyage, fearing for their lives. They then turned the ship back to the port she had just left, and, on arriving there she was sounding signals of distress, a call for help, as she had so far listed over, she was then on the verge of capsizing. Because of this most extraordinary list, which was due to grave unseaworthiness of the vessel, due to insufficient ballast and unserviceable water ballast tanks as will be presently shown, the cattle stowed down in the hold of this ship were unable to maintain their footing, slipped to the decks, and there over one-half of this cargo of 420 heads of cattle were crushed, smothered to death, and jettisoned. This throwing of the dead cattle overboard

was not caused by a sea peril, but by the unseaworthy instability of the ship herself, caused through lack of sufficient ballast.

Nevertheless, the Circuit Court of Appeals for the Fifth Circuit, holds that the ship is not liable for any loss to the shippers of said cattle.

But other Circuit Courts of Appeals and foreign and American authorities, as will be presently shown, hold that under just such circumstances the ship is liable, as a "personified entity", for the full measure of damages occasioned by its own unseaworthiness, no matter who signs the Bill of Lading; no matter for whom it is signed; no matter if a Bill of Lading is issued or not.

The FORT MORGAN STEAMSHIP COMPANY, claimant herein, in its answer, admits the shipment of the cattle at the port and for the destination stated by libelant; admits a listed condition of the ship at the dock, which they urge always existed in this vessel; admits a continual list of this ship to such extent and finally, so far over that within a few hours after leaving port it was necessary to abandon the voyage and bring her back. They admit the crushing and killing of over two hundred (200) head of cattle, on board this vessel on account of that listing. They contend that the charterer was responsible for this unseaworthy condition of the vessel and have impleaded it, the Central American Cattle Company, Inc., as a co-defendant, asking in the first place that the libel be dismissed, but if not dismissed that they have judgment over against the charterer. They contend by a great stretch of imagination that

libelant, a shipper, was even responsible for the unseaworthy condition of the vessel, and on that ground asked that the libel be dismissed. They further contend that a contract existing between the American Cattle Company, Inc., and Armour & Company, under the terms of which the Central American Cattle Company, Inc., was to sell to Armour & Company certain cattle of a specified description F. O. B. such vessel as might be determined upon at Port Limon, Costa Rica, that although the cattle in question was so delivered, on board, inspected by Armour & Company's representative and by such representative accepted as the cattle of Armour & Company, whereby, by reason of which under the expressed terms of said contract, Armour & Company became the sole owners of that cattle, that, nevertheless, because the charterers had stipulated to provide vessels to transport said cattle at a given rate of stipulated ocean freight, subject to exceptions from various perils, that Armour & Company could not, therefore, proceed in admiralty against the steamship "Fort Morgan", the carrier selected, for damages sustained by their own cattle laden on board of that vessel, receipted for by the master of that vessel and lost and damaged solely by reason of the unseaworthiness of that vessel; even though the contract referred to by claimant set out separately two distinct absolutely several agreements, one of which was for the sale of the cattle at a given price to be delivered and accepted on ship board, F. O. B. at port of loading, upon which loading, the purchase price agreed upon at once became payable to the seller and thus ended everything in relation to the contract of sale—the other severable portion of the contract is purely and simply an agreement

to provide ocean transportation at a given rate of ocean freight, etc.

Respondents still further urge that because of a compromise made by and between Armour & Company effecting a settlement of the price that was due and owing from Armour & Company to the American Cattle Company, Inc., upon the actual delivery of the cattle on board of the vessel at Costa Rica, which then and there terminated the contract of sale, and because of settlement made between Armour & Company and the American Cattle Company, Inc., for certain costs, charges and expenses incurred in taking care of bruised and maimed cattle recovered from the ship and taken care of at the instance of the Central American Cattle Company, Inc., that, therefore, the libelant could not hold the steamship "Fort Morgan" responsible upon the undertakings of that ship under its warranty of seaworthiness or obligation to safely transport the libelant's cattle from the said port of loading, Port Limon, to Jacksonville, Fla., notwithstanding the fact that the damages complained of are sued on under the bill of lading signed by the master of the ship for cattle received on board of the vessel which was killed, crushed, maimed or damaged solely and exclusively by reason of the gross unseaworthiness of the vessel itself, a breach of her own warranty and obligations undertaken.

The Central American Cattle Company, Inc., called in by the Fort Morgan Steamship Company as a co-defendant, admitted the allegations made by libelant that the vessel was in an unseaworthy condition at the time she received libelant's cargo on board and was in such unseaworthy condition at the time she

commenced her voyage, as well as before, and that libelant's cargo of cattle was, to a great extent, killed, bruised and maimed, as contended for by libelant; but the said Central American Cattle Company, Inc., contend that they were in no way responsible for damages resulting from the unseaworthiness of that vessel, and, on those grounds, only, ask that they be dismissed from the case. They did not set up, or in any way pretend, that a payment to them of the price agreed upon for the cattle F. O. B. the ship at the port of laden as was previously contracted for, or that the payments by libelant for the care and protection of such cattle, etc., which was recovered, did, in any way, or to any extent, bar libelant from its action against the steamship "Fort Morgan", for a recovery of damages arising out of the unseaworthiness, or fault of that vessel in its own undertaking, for the safe and proper transportation of libelant's cargo; nor do they set up such settlement as a bar to the action of the Fort Morgan Steamship Co., Ltd., against them for judgment over.

PLEADINGS AND EVIDENCE.

The facts of this case as declared in the pleadings, and as set out in the evidence, will be here discussed under their appropriate headings.

I.

THE BILL OF LADING.

The Bill of Lading sued on herein covers Tr. pp. 9-30, and among other pertinent things it contains the following stipulation in its paragraph 4, Tr. p. 10, to-wit:

> "The *carrier's responsibility* in respect of the goods *as a carrier* shall not attach until

> the goods are actually loaded for transportation upon the vessel and shall terminate without notice as soon as the goods leave the vessel's tackles at destination or other place where the carrier is authorized to make delivery or end its responsibility * * *".

It was only after such delivery on ship-board the damages occurred complained of by libelant.

It is in the usual form issued by common carriers; containing all the exceptions, benefits and advantages usually claimed by common carriers, which, by law, they may require. The bill of lading sued on, is, in fact, and in every essential particular a ship's bill of lading. It is not merely a received for shipment bill, but is signed by the master of the ship, as master, for the charterers, for cargo actually laden on board to be delivered by that ship at designated destination.

In the body of the bill of lading where the actual quantity of cargo received is designated, it is signed:

> "80 not shipped,
> "Thos. Johannesen, Master Steamship Fort Morgan",

indicating eighty less than the five hundred mentioned in the body of the bill of lading; and it is signed a second time as follows:

> "Central American Cattle Company, by Tho. Johannesen, Master S. S. Fort Morgan".

The actual execution of this bill of lading by the Master of the steamship "Fort Morgan", was made only after he, the master, of that steamship had actually received on board the said steamship the cattle

so shipped. This bill of lading is one which the United Fruit Company had printed for their own use, hence, the name of that company appears throughout the document (See bill of lading, Tr. pp. 9-30). But there further appears in the said bill of lading a declaration substituting the name of the Central American Cattle Company, Inc., for that of the United Fruit Company, by the following endorsement (Tr. p. 29), to-wit:

> "(Wherever United Fruit Company appears, read: The Central American Cattle Company, Inc.)"

In respect to the authority of the Master to execute bills of lading in whatever form the charterer may require the charter party in existence in this case especially stipulates as follows:

> "* * * That the Captain, although appointed by the owners, shall be under the orders and directions of the charterers as regards employment, agency or other arrangement; and the charterers hereby agree to indemnify the owners from all consequences or liability that may arise from the Captain signing bills of lading or otherwise complying with their orders or directions." (Tr. p. 73, sentence 4, Art. 4 of charter).

It is because of the existence of the foregoing stipulation contained in the charter that the claimants have brought in here the said Central American Cattle Company, Inc., charterers, that they, claimants, might recover over from said charterers whatever sum libelants may recover as against them in this cause.

This bill of lading contains all the usual exceptions set out in favor of common carriers in the usual form

of carriers' bills of lading and the defendant, the Fort Morgan Steamship Company, have sought herein the benefit of every exception or agreement which they saw fit to urge for their account; but none of them attach in this particular case because the loss was directly due to gross unseaworthiness of the vessel, and it is that source of damage which alone is complained of.

In respect to agreement in bill of lading relating to insurance on cargo; which appears at Tr. 25-26, par. 23, and reads as follows:

> "In the case of any loss or damage for which the carriers shall be liable, the carrier shall to the extent of such liability have the full benefit of any insurance *that may have been effected* upon the goods or against said loss or damage, and as well also of any payment to insured by underwriters repayable only out of recovery against the carrier, notwithstanding the underwriters were not obligated to make such payment."

the Fort Morgan Steamship Company, in Article 23, of their answer (Tr., p. 68), claim full benefit of said clause, pleading that they are informed and believe insurance on this cargo was effected. Manifestly, respondents consider themselves parties to that bill of lading, made by their agent, the master of said vessel.

But, as a matter of fact, when the representative of Armour & Company accepted the cattle properly loaded F. O. B. the steamship "Fort Morgan", and issued his receipt therefor, giving therein the number of cattle received and their total weight, which re-

ceipt, under the terms of the contract, did, *ipso facto*, make Armour & Company liable for the agreed price (5c per pound of said given weight), and vested in them ownership of said cattle, Armour & Company took out insurance covering this shipment, but only *against stranding, sinking, burning, fire or collision* (Tr. 166), and have filed in this cause their policies of insurance covering these risks (Exhibits C. 1, C. 2, and C. 3). As the loss was not occasioned by any of the insured risks, no insurance under said policies was collectable.

It is noteworthy that claimants of the steamship "Fort Morgan", in anticipation that insurance was effected to cover this loss, were quick to avail themselves of the existence of the aforesaid provision of the bill of lading, which they could only do on a ship's bill of lading to which they were parties or privies. But, after all no insurance was effected against loss arising from unseaworthiness.

The bill of lading contains the folowing stipulation (Tr. p. 28):

> "Freight prepaid as per contract subject to Live Stock Agreement."

In paragraph No. 1 of the bill of lading, it is specially provided that the freight is *adjusted* in consideration of all the terms and provisions of this contract. That is to say, the terms of conditions of the bill of lading.

The ship, being under a lump sum charter to the Central American Cattle Company, Inc., that company stipulated for the freight. The ship getting her lump

sum charter, from the Central American Cattle Co., Inc., whether freight was earned or not.

The Live Stock Agreement above referred to, appears at Tr. pp. 48, 49, 50, and stipulates for room for five hundred (500) head of cattle (more or less) on deck and in the hold of the steamship from port of shipment to Jacksonville, Fla., belonging to Armour & Company, with necessary water. So, also, the Central American Cattle Company, Inc., to provide food for said cattle and proper persons to attend them.

Then, too, in paragraph number one of the Bill of Lading, with respect to its own terms and conditions, provides (Tr., p. 9), as follows:

> "1. The freight is adjusted in consideration of all the terms and provisions of this contract."

II.

THE CHARTER PARTY UNDER WHICH THE S. S. "FORT MORGAN" WAS OPERATING; AND SPECIAL ORDERS TO THE MASTER THEREIN.

The charter party concerned in this case covers transcript pages 70-78 inclusive. It was entered into on August 23, 1917, between the Gulf Coast Plantation Company, as owners, to the Central American Cattle Company, Inc.

It is especially provided therein that the said steamship "Fort Morgan" was tight, staunch, strong and in every way fitted for the service, having *water-ballast*, etc. Among other special provisions it stipulates:

> "That the owners shall provide and pay for all provisions, wages, and consular ship-

ping and discharging fees of captain, officers, engineers, firemen and crew; shall pay for the insurance of the vessel, also for all engine room and deck stores, and maintain her in a thoroughly efficient state in hull and machinery for and during the services * * * provide for all passengers in the best manner according to their class * * ".

Respecting the trades in which she would be employed, this charter (Tr. p. 71) stipulates:

"* * * *To be employed in carrying lawful merchandise, including petroleum or its products in cases, and passengers so far as accommodations will allow.* * * *"

"* * * To victual and provide for all passengers in the best manner, according to their class, charterers paying at the rate of $2.00 per day for each first class passenger."

The charterers are obligated to pay $16,000 lump sum per calendar month. Hence, the charterers are entitled to collect the freight on shipments and passage money.

The charter still further provides:

"That the cargo or cargoes shall be laden and/or discharged with the assistance of the steamer's crew, and tackle, in any dock or at any wharf or place that the charterers or their agents may direct, provided the steamer can always safely lie afloat at all times of tide. * * *"

"*That the captain, although appointed by* THE OWNERS, SHALL BE UNDER THE ORDERS AND DIRECTION OF THE CHARTERERS AS REGARDS EMPLOYMENT, AGENCY OR OTHER ARRANGE-

> MENTS; and the charterers hereby agree to indemnify the owners from all consequences or liability that may arise *from the captain signing bills of lading or* OTHERWISE complying with their orders or direction."

With regard to the ports between which this vessel could be engaged under the charter, it specifically provides that she might be employed by the charterer

> "Between any safe port and/or ports in the United States of America and West Indies, and Gulf of Mexico, and/or Caribbean Sea, and/or Central America (Magdalena River excluded), and/or South America, not south of the River Platte, as *the charterers or their agents shall direct.*"

The charter, as above indicated, is a commonly used form; that is to say, it takes in lawful trades in general, even to the carrying of petroleum and passengers, with provision respecting the mutual obligations of owners and charterers regarding the use of the vessel, if employed in the fruit trade, etc.

MASTER'S INSTRUCTIONS FROM OWNERS OF S. S. FORT MORGAN.

The master testified that he had instructions from the owners to follow the Central American Cattle Company, Inc.'s orders (Tr. p. 236), and on page 252 that Mr. Whilden, President of the Central American Cattle Company, represented the S. S. "Fort Morgan" and owners. This testimony was given by the master in the presence of Mr. Burge, the president of the owners, who succeeded him as a witness, and was not denied.

III.

THE UNSEAWORTHINESS OF THE STEAMSHIP "FORT MORGAN" AT THE TIME WHEN SHE RECEIVED LIBELANT'S GOODS FOR SEA TRANSPORTATION AND THE CAUSE OF SUCH UNSEAWORTHINESS.

The libel alleges in substance (Art. 5, Tr. p. 3), that at the time the steamship "Fort Morgan" commenced her voyage she had a list which constantly increased as she moved along on her way to sea, until when only a short distance from port, she had keeled over so far her officers and crew positively refused to proceed further on the voyage, and because of their grave fears for the safety of said vessel and for themselves insisted upon returning to her port of departure. And in Article 6, (Tr. p. 3), libelant further alleges in substance that the ship was put back to Port Limon, and on its approach to and arrival at said port she sounded distress signals, calling for help, being in a condition which threatened to capsize the vessel, she having a list at this time of about thirty-five degrees.

The Central American Cattle Company, Inc., impleaded as a co-defendant, admits (in Arts. 5 and 6, Tr. p. 100), the foregoing allegations of the libel, excepting about refusal of officers and crew to proceed, of which they plead ignorance.

The Fort Morgan Steamship Company, Ltd., admits (in Arts. 5 and 6, Tr. p. 59), the foregoing allegations of the libel.

Then, too, the master of the steamship "Fort Morgan", testifying to the time when his officers and crew

refused to go further with the ship, says (Tho. Johannasen, Tr. p. 281):

> "A. Well, if I was refused by everybody of course I couldn't go any further. If you are refused by everybody, and if you couldn't go any further, you have got to stop. They were asked to proceed, but they said no, they couldn't go.
> Q. That is the crew?
> A. The crew and officers and all."

Another significant fact is testified to by the Master, in respect to the heel, or list of the steamship "Fort Morgan," even before as well as at the time she commenced the voyage. He says (Johannasen, Tr. p. 293):

> "If the ship had been straight when loaded, there would have been no danger."

From an extract taken from the ship's log set out in a report filed by claimant (the log was not produced, Tr. p. 396), it appears that while the vessel lay at the wharf she had a list of seven degrees, and after letting go her moorings the vessel listed to thirteen degrees. That on getting outside the harbor she had listed to thirty-eight degrees, and was then brought back to port. On arriving in port, her master testifies, (Johannasen, Tr. p. 276), she was then listed about forty-five degrees.

Mr. Edward J. Mitchell, representative of Armour & Company, libelants, testified (Tr. p. 152), that when the steamship "Fort Morgan" was at Port Limon, before taking on any cargo, she showed a list of some

six or seven degrees. That when the cattle was being loaded she showed a little heavier list, and,

> "I spoke to the captain about this list, and he told me it was alright; that she always had that list, but that after she got out to sea and got under way she would right herself." (Mitchell, Tr. p. 152).

The Fort Morgan Steamship Company, Ltd., set up in their answer, just such a representation (Art. 5, Tr. p. 59), as is attributed to the master in the above quoted testimony of Mr. Mitchell. Claimants—the Fort Morgan Steamship Company, Ltd.—called to the stand the master of the ship, and he testified as follows: (Thom. Johanason, Master):

Tr. p. 267:

> Q. Well, as they kept on loading the list of vessel kept on increasing to port, didn't it?
>
> A. Yes, a little bit—little by little— * * *.

Tr. p. 346:

> Q. Is it not a fact that in your statement to the Port Captain at Port Limon, you stated that your vessel was listed at the wharf and that *from the time you left the wharf until you got back to Port Limon she was continually going over gradually to port?*
>
> A. Yes, sir.

Tr. p. 276:

> Q. When your vessel got back to Port Limon, what was the degree of list she had?
>
> A. Forty-five.
>
> Q. *Then she was practically at the point of capsizing*, wasn't she?
>
> A. Yes, she couldn't stand no more * * *.

CAUSE OF UNSEAWORTHY CONDITION OF STEAMSHIP "FORT MORGAN".

The steamship "Fort Morgan", is represented by her charter to be *a water-ballast ship*, that is to say, a ship provided with tanks in her bottom, which should carry such weight of water at all times to give the ship stability so she may maintain a safe upright position under all conditions of the sea which might reasonably be expected to be encountered. In other words, this water ballast should at all times be of sufficient weight to give the ship proper weight of water ballast, affording seaworthy stability. In addition to this other tanks, such as the fore and the aft peak tanks are installed to afford water for boiler use, and for all general ship's use of whatever nature.

Libelant alleged in article ninth of its libel (Tr. p. 4), that among various conditions of unseaworthiness of said steamship "Fort Morgan", existing before and at the time of the commencement of said voyage, that

> "the fore-peak tank was empty, that number one tank contained not more than fourteen inches of water, and was not filled to capacity because it was in such a leaky condition it would not hold more than fourteen inches of water, although its full capacity was requisite to assist in giving the ship necessary stability to make her seaworthy. The after-peak tank was empty and not in condition to be used for water. The water for boiler use, and for use of cattle as well as for ship's general use, was taken from tanks of said vessel (water-ballast tanks) reducing the weight of water below the ship's water-line."

The Central American Cattle Company, Inc., brought in by the Fort Morgan Steamship Company,

as a co-defendant with it, admits the truth of the foregoing allegations in its answer (Art. 9, Tr. p. 97), wherein it says:

> "The allegations of the ninth article of the petition (libel) are true."

The Fort Morgan Steamship Company admitted in part and denied in part these averments, as is hereafter shown.

In this record is found the report which was joined in by *three surveyors*, acting on behalf of Lloyds, who made a survey of the vessel to determine the cause of her condition when she put back to Port Limon. It shows that the listing and nearly complete capsizing of this water-ballasted vessel was due to lack of necessary water ballast, because the two peak water tanks were empty and never had any water in them and others of her tanks, water ballast tanks were not in condition to hold water: while water for steaming purposes and for watering the cattle was taken from her ballast tanks (Tr. pp. 269, 259), there being no other supply available for boiler use or for watering the cattle. And, further, that something like one hundred and fifty tons of coal, for ship's use, was stowed up in the shelter deck. This deck is the upper, or weather deck.

Here is the surveyor's report in full, taken from Tr. pp. 324-327:

> "Messrs. United Fruit Company,
> "Port Limon, C. R.
> "Pursuant to your instructions in behalf of Wm. Le Lacheur Lyon, Lloyd's Agent in San Jose, Costa Rica, we, the undersigned,

repaired on board the steamship 'Fort Morgan,' of Bergen, Norway, of 1119.93 tons gross, 631.76 net tons, triple expansion engine, 200 nominal horsepower, official signal J.Q.D.C., for the purpose of surveying and reporting to you the cause or causes of her taking a heavy list while on a voyage from this port to Jacksonville, Fla., U. S. A., with a cargo of live steers; her subsequent return to this port in distress, and present seaworthiness.

"No plans are available on board showing tank capacities, etc. The Chief Officer and Chief Engineer state that the tanks have approximately the following capacities:

Fore peak tank.....	23 tons
No. 1 tank.....	35 tons
No. 2 tank, which is subdivided	40 tons, that is 20 each side.
No. 3 tank.....	35 tons
After peak tank.....	12 tons

"This ship has no ballast tanks midships under her engines or boilers.

"The following is the condition of the tanks *according to statements of the Chief Officer and Chief Engineer, when vessel sailed from this port* at 6 P. M. November 29th, 1917:

Fore peak tank.....	Empty.
No. 1 tank.....	Contained 14 inches of water.
No. 2 tank, port side..	About 5 tons of water used out of it.
No. 2 tank, starboard side.....	30 inches of water. Full
No. 3 tank.....	Full.
After peak tank...	Empty, not in condition to be used for water.

"On sounding *we found 14 inches of water* in No. 1 tank, and upon inquiring as to why this tank had not been pumped full, learned from the *Chief Officer and Chief Engineer* that this tank had never been filled to its capacity since they had been in the ship, the Chief Officer and Chief Engineer stating that *they understood it leaked when so filled.*

"*We found* starboard side of No. 2 tank full of water, and port side of this tank *empty.* Chief Engineer reports that when ship took the heavy list they pumped some of the water from the port side of No. 2 into the fore peak tank, and the balance overboard, so as to lighten steamer on port side. We found No. 3 tank with 18 inches of water, Chief Engineer reporting that he had used water from this tank for boilers since putting back from sea.

"We found all bilges dry, with the exception of port, forward hold bilge, which had about 14 inches of water, this probably being due to rain and drainage from holds, as all hatches were open all of the time and during heavy rain.

"We found part of the cattle fittings intact and that the balance had been removed. On investigating with stevedores and crew we learned that the cattle fittings held intact until partly removed by stevedores in order to discharge the live steers at wharf when steamer was heavily listed to port, and in order to dump the dead animals at sea; and partly by crew after completing discharge in cleaning up holds, etc.

"In investigation in regard to bunker coal, we find this vessel had on board two hundred and twenty-five long tons of coal when the loading of cattle at this port was commenced.

Of this amount *about two-thirds was in the shelter deck bunker*, and the balance in the cross bunker which reaches from the shelter deck to the ship's bottom; all evenly divided on both sides. Chief Engineer reports that from time of commencing loading until ship took list and put back for Port Limon, 12 tons of coal were consumed.

"We attribute the cause of the steamer not righting herself after taking a heavy roll, due to insufficient ballast, considering the nature of the cargo and amount of top weight, which consisted of coal in shelter deck bunker and cattle above the shelter deck.

"We consider the ship is now seaworthy while in ballast or if loaded with a heavy cargo which would give her sufficient stability not to require ballast in No. 1 tank. Before loading a light or movable cargo, or deck load, which would necessitate the use of No. 1 tank for ballast, we recommend that this tank be tested, and if found leaky, as reported, satisfactorily repaired, and retested.

"We also recommend that in case of reloading a similar cargo of cattle, that tanks Nos. 1 and 3 be filled to their capacity and kept so during the entire voyage, and that an additional one hundred tons of ballast be secured in the holds, and that in case tanks Nos. 1 and 3 cannot be filled to their capacity and kept so during the voyage, a further amount of ballast be secured in the holds equal in weight to that of these two tanks when filled with water ballast.

"In case steamer sails from this port without having No. 1 tank tested and repaired if necessary, we recommend that this be done

at the earliest convenience, and especially before loading a dry cargo or one necessitating the use of this tank for ballast.

"Respectfully submitted,

"(Signed)

"Frederick Seekman O. C. 0399016,

"Marine Supt.

"(Signed)

"Ynge Sorensen, O. C.-A-3016,

"Asst. Marine Supt.

"(Signed)

"C. D. Green, S/S. Agent, by appointment from Wm. Le Lacheur Lyon, Lloyd's agent in Costa Rica.

"Given under my hand and seal of office this 3rd day of December, 1917.

"(Signed) Stewart E. McMillin,

"U. S. Consul.

"Port Limon, Costa Rica."

In defense set up by the Fort Morgan Steamship Company, Ltd., in article nine of their answer, to the allegation of the libel, that when this vessel left Port Limon the forepeak tank and the afterpeak tank *were empty*, they say (Tr. 60):

> "That the forepeak tank referred to in said article is and was a small tank built into the ship *for the purpose of supplying the boiler and was properly used for that purpose.* That the afterpeak is a small tank and could have been filled, but was not used, and its use would have had no substantial effect."

But the surveyors in their report hereinabove set out state that while the capacity of the forepeak tank would be twenty-three tons of water and of the afterpeak tank would be twelve tons of water, a combined

capacity of thirty-five tons, they report that the condition of the tanks *according to statements of the Chief Officer and Chief Engineer, when the vessel sailed,* was that the:

> *"Forepeak tank empty, afterpeak tank empty, not in condition to be used for water."*

Neither the Chief Engineer or Chief Officer were ever called by respondents as witnesses in this case, although the above-quoted official survey was made December 3, 1917 (Tr. p. 324), and a copy thereof was furnished the master of the ship on or before December 8, 1917 (Tr. p. 322).

The master of the vessel (Tr., 269, 270, 271) states that the boiler water, which is for steaming purposes, was carried *in the bottom tanks.* And those are the tanks referred to as *ballast tanks.* Hence, the record shows by claimant's own pleading that although the forepeak tank was built into the ship for the purpose of supplying the boiler with water (Art. 9, respondent's answer) *it was empty,* and the ship's boiler water was drawn from the ship's ballast tanks, thus continuously reducing the amount of her ballast. So, also the water used to water the cattle was taken from the ballast tanks (Tr., 259), thus still further consuming and reducing materially the ship's ballast, which necessarily seriously affected the ship's stability. That report shows the further fact that about two-thirds of two hundred and twenty-five tons of coal (say 150 tons) were stowed in the shelter deck. This condition, we submit, necessarily to a marked degree, rendered the vessel cranky and liable to turn

over. So it is just as the master of the steamship "Fort Morgan" testified (Tr., 293):

"If the ship had been straight when loaded there would have been no danger."

Captain Tho. Johannasen, master of the steamship, "Fort Morgan," respecting the water tank conditions and lack on shipboard of provision for boiler water and for watering cattle, testifies as follows:

Tr. 269:

Q. Then you were using water out of the bottom tanks for boiler purposes—steam purposes—were you?

A. Yes, I guess he did.

* * * * *

Tr. pp. 270-271:

Q. Now, Captain, that doesn't answer the question I asked you. Was your vessel equipped or furnished with any tank that carried water that was used solely and exclusively for boiler purposes?

A. No.

Tr. p. 259:

Q. Now, you say they took the water out of the ballast tanks for the purpose of watering the cattle?

A. Yes, sir.

Q. And that meant taking the weight out from the bottom of the ship?

A. Yes, sir.

Q. And the more weight you take out of the bottom of a ship the more tender she becomes, doesn't she.

A. Yes, sir.

Q. The more liable she is to roll over?

A. Yes, sir.

Tr. p. 268:

Q. You know it is your business to keep your vessel straight?

A. Yes, sir.

Tr. p. 312:

"Libelant offered in evidence a sketch drawn by the master of the steamship 'Fort Morgan,' showing the location of the cattle on the different decks as loaded, according to his recollection, and the position of the ballast tanks—the usual position at the very bottom of the ship, so that the ship would have the benefit of every pound of water contained therein.

"This sketch has gone up in the original."

The following radiograms are proven (Tr. pp. 253-254) to have passed between the president of the owners of S/S. "Fort Morgan," at New Orleans, and the master of S/S. "Fort Morgan," at Port Limon, C. R.

Tr. p. 220:

"'Fort Morgan,' Port Limon:

"Advise if cattle properly loaded also what caused accident and when will sail.

"BURGE."

Tr. p. 219:

"*All cattle properly loaded disaster* caused by *ballast tanks* and heavy seas.

"THO. JOHANNESEN,
"Master S/S. 'Fort Morgan'."

Tr. p. 221:

"Burge 'Fort Morgan" *requires drydocking and some repairs* last drydocked New Orleans May nineteen seventeen.

"THOMAS JOHANNESEN,
"Master S/S. 'Fort Morgan.'"

"Burge" is the president of the Gulf Coast Plantation Company who chartered the vessel as owners to the Central American Cattle Company (Tr. 349).

We will show further on that the alleged "heavy seas," an alleged *concurrent* cause, is a myth.

IV.

CLAIMANTS FAILED TO PRODUCE THE SHIP'S OFFICIAL LOG OR THE DECK SCRAP LOG, OR ENGINEER'S LOG.

The log book of the steamship "FORT MORGAN," which would have shown all weather conditions, was not produced. The Master admits (Tr. p. 283), before leaving port, conditions of sea visible during daylight. He left at about six o'clock.

> Q. You could see the sea on down to as long as the twilight or daylight—
> A. Yes; I was looking down on the beach and on the key, but *I couldn't notice anything —anything serious.*

It is not pretended any bad weather existed, but it is urged that a *ground swell*, coupled with lack of sufficient water ballast caused the ship to list.

While we deny that there was any unusual ground swell, anything more than what is to be always experienced along the seashore, we submit that the alleged ground swell is stated only as a *concurrent cause*—the other cause being unseaworthiness of ship, due to lack of sufficient water ballast, which deficiency was occasioned by necessity to use water ballast for boiler pur-

poses, for watering the cattle, etc., because both of the peak tanks were empty on leaving port, one of which was too leaky to hold water, and one of which respondent avers was built into the ship especially for supplying the ship's boilers with water.

It is a most significant fact that the mate's deck log, the engineer's log and the ship log are not before the Court. The ship's official log would show the reading of her barometer, the direction of the wind, its velocity, the condition of the sea, etc., but it was not shown and not produced even to refresh the master's memory. The chief engineer's log, which should show the condition of the tanks, what water he carried in them, what tanks were empty and why; what use was made of the water, etc. The scrap log of the Chief Mate would evidence the continuing list of the vessel and the cause thereof, and would show if anything was done by the officers of the ship to correct that list and with what effect, if any. They are not in evidence.

In a report to determine whether or not the "Fort Morgan" sustained any damage by heeling over, covering a manifestly *superficial survey* at New Orleans, some weeks after the happening of the event, it is said (Tr. p. 396):

> "For further particulars see Log Book and Master's Protest.
>
> "It is stated that while vessel lay at the wharf at Port Limon at 6:00 P. M., on November 29th, 1917, with 420 head of cattle on board that vessel, had a list to port of 7

degrees. *After letting go moorings vessel listed over to 13 degrees*, and when vessel got outside Port Limon in a heavy swell, *vessel listed to port 38 degrees*, master considering the danger returned to Port Limon and anchored. About 9:00 P. M., on November 29th, 1917, lifted anchor and came alongside of wharf at about 12:00 P. M., November 29th, commenced discharging cattle that were alive, 212 were found dead and dying, vessel left Port Limon November 30th, 1917, about 5:00 P. M. and proceeded to sea to throw overboard the carcasses of 212 dead cattle. Returned back to Port Limon on Saturday, December 1st, at 7:30 A. M., and anchored awaiting orders.

"On December 5th, 1917, about 1:00 P. M., came alongside wharf to discharge hay and fumigate, and left for New Orleans on December 5th, 1917, at 9:30 P. M., in ballast, and arrived at New Orleans and anchored at the Point on December 10th, at midnight.

"It is stated that when the vessel was alongside the wharf before leaving Port Limon, that all tanks double bottom were filled, as a certain amount of water had been used on the way from New Orleans where the tanks were previously filled from the Mississippi River, and the amount taken to fill up these tanks at Port Limon is stated to be 60 tons.

"Upon examination of the vessel we find that vessel has no apparent damage."

So, on trip down from New Orleans, down to Port Limon, it appears from the above, water was used from the ship's ballast tanks. It was, manifestly, a dangerous practice freely indulged in on this ship.

The Surveyor who made the above report (Olsen, Tr. p. 309) admits that if the "FORT MORGAN" was loaded with a part deck cargo and part in the hold that such a ship could as safely carry cattle in those places, as she could have carried cargoes of fruit or other goods, if the master had seen to it that he had the necessary amount of ballast; of course, any kind of ballast, water ballast as well as other ballast. Let it be understood that this "water ballast" vessel did not carry an independent supply of water for boiler purpose, etc., hence was continually using up her water ballast for steaming purposes, and ship's use in watering its cargoes of cattle, etc.

V.

FAILURE OF CLAIMANT TO PRODUCE THE CHIEF OFFICER AND THE CHIEF ENGINEER, WHO WERE THOROUGHLY CONVERSANT WITH CONDITION OF TANKS AND LACK OF WATER BALLAST.

The chief engineer and the chief officer of the S/S "Fort Morgan," both volunteered the information set out in the official survey of that vessel herein above quoted. A copy of it was served on the master within a few days of the time of the disaster. The libel was filed within a few months after the disaster. The men continued in the service of that vessel for a period of time not disclosed by the record. There is nothing in the record to show how long after the libel was filed in this case these men continued in the ser-

vice of the ship, or that anything was done to enable claimant to keep in touch with them.

Claimants set up, through their proctor, Mr. Leovy (Tr. p. 395), February 26, 1920, that they had made every effort to locate these men, but because of the long time the suit was pending they were unable to do so; without any showing how long these men continued in the service of said vessel, etc., or why their testimony had not been taken before or at the time their services with the company terminated. In fact, the master, when testifying September 17, 1919, says (Tr. p. 267) he did not know where the engineer was.

"He may be on the boat yet, I can't say."

We deem it sufficient to mention the above fact, leaving to your honors to determine what inference arises therefrom, without citation of authorities.

VI.

CONSTRUCTION OF THE CATTLE FITTINGS. BY WHOM MADE AND THEIR SUFFICIENCY.

The contract between Armour & Company, and the American Cattle Co., Inc., which respondents have brought into this case, does, in respect to one of the provisions in that part, which undertakes ocean transportation at a stipulated ocean freight, specially provides, as follows (Tr., 80):

> "It is understood that first party (Central American Cattle Co.) is to charter and equip one or two steamers for carrying such cattle. All such equipment to be at the expense of first party or the Steamship Company, and

> to be constructed to the satisfaction of the inspector of the underwriters interested; and, in addition, ample space to feed and water said cattle. Likewise, steamer to provide ample supply of good fresh water for the cattle and ample supply of United States hay or native grass for feed for said cattle during said voyage; * * * "

The foregoing undertaking of the charterer was carried out at their own cost, charge and expense and to the full satisfaction of the master of the ship, without any assistance from or interference by libelant, as will be presently shown.

In the fourth article of the libel it is specifically alleged that the said cattle were all safely placed on board of said vessel; were properly stowed and tied to make the voyage without danger to them, and would have safely made the said voyage but for the unseaworthy condition of the said vessel.

The Central American Cattle Company, Inc., in their answer to this article says:

> "The allegations of the Fourth Article of the libel are admitted to be true."

The Fort Morgan Steamship Company, Ltd., denies the allegation that the vessel was in an unseaworthy condition, and says that as to the remaining allegations of said article, they have not sufficient information for answer. In other words, although the radiograms produced show that the Master of the steamship "Fort Morgan," sent a wireless

to the president of the Company owning said ship, in response to the request that he, the president, be advised if the cattle were properly loaded, answered that wire by saying all cattle were properly loaded (Tr. p. 219). The claimants pretend in their answer not to know whether the cattle was properly loaded or not, and have sought to show that the cattle pens were not properly constructed, that they broke down under the strain of the cattle, causing the vessel to list, and that they should not have been constructed on the deck or in the hold of that ship.

Not only was the ship chartered as a general carrier of goods and merchandise to a cattle company, but it is a fact that this same ship on previous occasion operated solely for her owners' account, had carried on board five hundred fifty (550) head of cattle (seventy more than she had for libelant) for the Battencourt interest (Tr. p. 237). The master says on page 285 that the owners knew of those services.

So, also, the master of the "Fort Morgan," at Tr. p. 286, testifies that she carried deck cargo of lumber and at page 230 says:

> Q. State the nature of cargoes that were carried on the ship on these trips.
>
> A. Four cargoes of bananas, and one cargo of cattle prior to that last one, and several cargoes of corn, and hogs on deck, to Havana from New Orleans and generally all sugar from Cuban ports to New Orleans."

These besides the lumber trips before referred to.

It is also shown that the president of the Company sent on board or knew that there was delivered on board at the City of New Orleans a quantity of lumber to be used for constructing the cattle fittings for the particular voyage under consideration and his wireless to the master (Tr. p. 30) particularly asks:

"Advise if cattle properly loaded."

Then there stands the master's uncontradicted testimony given in the presence of the president of the owning Company, who succeeded the master as a witness, stating that he was advised by the ship's owners to follow the Central American Cattle Company, Inc., orders (Tr. p. 263), and on page 252 the master testified further that Mr. Wilden, president of the Central American Cattle Company, Inc., represented the steamship "Fort Morgan" and owners, respecting the construction of the cattle fittings. The master testifies (Tr. pp. 289-290 and 320) that he approved of the way the cattle pens were built and the way in which the cattle were loaded on board. That in his judgment the cattle were properly stowed and tied.

Notwithstanding the repeated averments set out in the Fort Morgan Steamship Company's answers that Armour & Company, undertook and that Armour & Company were obligated to and that Armour & Company participated in the construction of the cattle fittings, there is not in this record any credible testimony which justifies any such declaration. The Central American Cattle Company, Inc., were obligated

to erect suitable cattle pens, properly located to the satisfaction of the underwriters, etc. The cattle company admitted that this service was a duty resting solely upon themselves and contended that they did construct proper, suitable, safe fittings.

Before pointing out evidence which shows that the libelant had nothing to do with construction of fittings, that the libelant did not by itself, or by or through any of its representatives give authority to any one to participate in the construction thereof for the account of libelant, we will first take up the testimony of the master of the steamship "FORT MORGAN" to show that the cattle pens were not only constructed by and with his consent, but were in every respect approved by him, and by him deemed safe and proper.

In the cross-examination of Captain Johannesen, master of the said vessel, he testifies (Tr. pp. 289-290):

> Q. Now, when these cattle pens were being constructed, you looked after whatever was necessary to be looked after with respect to them, that related to the safety of the ship, didn't you?
>
> A. Yes, sir, I was looking after everything, especially the things that was needed most for the ship, for the ship listing over—I was looking after everything on the ship like the shifting-boards and *things that would make the ship secure*, and then while they were putting the pens up, I left that to Wilkinson to do the best way for the cattle.

Q. Did you tell him about how many cattle you wanted to the pen?

A. No. Of course, I couldn't do that. That was up to him. That was his business. *So long as I saw that the ship was safe.*

Q. In other words, anything they would do that you thought was not safe or proper you would not let them do it, would you?

A. No, sir.

Q. *So whatever they did, when it was finally finished up, that met with your approval?*

A. Yes, sir.

Q. *Therefore, you approved of the way these cattle pens were built and you approved of the way the cattle were loaded on board.*

A. *Yes, sir.*

Q. Any changes that you wanted made, and anything that you wanted done, no matter what it was, they were always ready and willing to do it as you wanted?

A. *Yes, sir.*

In the testimony of this same master of the steamship "Fort Morgan," on pages (Tr., 320), he affirms a previous statement made by him, to this effect:

Q. Captain, going back to the matter of that protest or statement that was made by you to the captain of the port, or before the captain of the port of Port Limon, it appears from the copy that I have of that report that you stated to the port captain as follows: "I must say also that to my judgment the cattle was *properly stowed and tied* to make the voyage without any danger." Is that correct?

A. *That was my belief when we left the wharf.*

That ARMOUR & COMPANY, INC., had nothing whatever to do, directly or indirectly with the construction of the cattle fittings or any part thereof is evidenced by the following testimony of Mr. Edward J. Mitchell (Tr. p. 148), agent for Armour & Co.:—

> Q. Did Armour & Company through you or anyone else have any supervision or direction or control over the putting up of those fittings?
>
> A. No, sir.
>
> Q. Do you know if Mr. Wilkinson in any way aided in any part of the work?
>
> A. Only he worked for Whilden (President of the American Cattle Company). He worked and helped in putting up his fittings.
>
> Q. Was he doing that on behalf of Armour & Company?
>
> A. No, sir.
>
> Q. Did Mr. Wilkinson ask you anything about his going in to aid or assist in the putting up of those fittings?
>
> A. He did. He asked me if it was all right. I told him he didn't have anything to do with that, and I was kinder surprised that he was working, and he told me that Mr. Whilden (President, American Cattle Company) was paying him for helping him, because the carpenters and good labor was hard to get down there, and I told him at the time, why, it would be all right.
>
> Q. But in doing that he was working for Mr. Whilden, of the Central American Cattle Company?
>
> A. Yes, sir.

Mr. Mitchell, who testified as above, was representative of Armour & Company, to inspect and accept

cargo; and Mr. Wilkinson was employed by Armour & Company as super-cargo only; so, therefore, his duties for Armour & Company could commence only after the Armour cargo was laden on board. He died some several months before libelant's testimony was taken.

We respectfully submit that the fittings were properly constructed; that the master of the ship saw to it that these fittings did not interfere with the safety of the ship; and that libelant had nothing to do with their construction, and was not charged with any obligation to do anything in respect to those fittings. That, in so far as libelant was concerned he had a right, an absolute right to look to the master of that ship to see that she was safely and properly loaded before she commenced her voyage.

VII.
MEASURE OF DAMAGES.

That the contract for the sale and purchase of the cattle f. o. b. the steamer "Fort Morgan" was completed and at an end between the parties is evidenced by the receipt given by their agent, James Mitchel, appearing at Tr. p. 187, which acknowledges *receipt and acceptance* from the Central American Cattle Company, Inc., in good condition on board of the Norwegian steamship "Fort Morgan," the cattle concerned in this case, weighing three hundred forty-six thousand three hundred two pounds (346,302 lbs.) live weight, applying on the contract of sale referred to, which stipulates that this cattle should be paid for f. o. b. the vessel, at five cents per pound, live weight.

On Tr. p. 186 appears the American consular health certificate which shows that on the same day the cattle were loaded on the S/S "Fort Morgan" the said Mitchell, agent for Armour & Company, libelant, made affidavit, as required by law, that the said four hundred twenty (420) heads of cattle on board of that steamer belonged to Armour & Company.

The bill of lading of the steamship "Fort Morgan" provides Tr. p. 24 that the carrier will not be liable for more than the invoice value of the goods. This invoice value is shown to be seventeen thousand three hundred fifteen 10/100 dollars; being the said three hundred forty-six thousand three hundred two pounds (346,302 lbs.) shipped f. o. b. at five cents per pound.

Mr. Kirk, Tr. p. 175, counsel for libelant, having personal knowledge of the money paid out by libelant, as a result of the disaster complained of, says:

> A. $17,051.91, money that Armour & Company has actually paid out on account of the cattle which were originally loaded on the steamer "Fort Morgan," after allowing the credits for the fifty that were received.
>
> * * *
>
> A. That is the actual expenditure by Armour & Company on account of these 420 head of cattle, not counting any expense of our men in Central America or any other expense at all, other than what we have actually paid the Central American Cattle Company.

But there was cattle saved from the disaster, put out at pasture, and expenses incurred in relation to

their care. Against those expenses stands certain returns, all of which figure out as follows:

Of the cattle saved one hundred forty-nine (149) head had been so injured, notwithstanding their care and upkeep, the best figure obtainable for them in Central America was twenty dollars ($20.00) per head (Tr., p. 159), they being unfit for shipment to the United States. This gives a total of two thousand nine hundred eighty dollars ($2980.00).

Fifty more head of cattle were conditioned for shipment and delivered to ARMOUR & COMPANY, Jacksonville, Florida. They were worth three thousand seven hundred fifty dollars ($3750.00), but against this was a freight payment of twenty-five dollars ($25.00) per head, or a total debit of one thousand two hundred fifty dollars ($1250.00), leaving a net value of two thousand five hundred dollars ($2500.00), for cattle so shipped.

Against this five thousand four hundred eighty dollars ($5480.00) stands the cost, charges and expenses for labor, foodstuff in the care of these cattle, amounting to two thousand two hundred eighty-three dollars and thirty-two cents ($2283.32). This leaves a balance of three thousand three hundred ninety-seven dollars ($3397.00).

The testimony on the question of these losses is set out in the deposition of W. C. Kirk (Tr. pp. 168 to 177, inclusive) and in the vouchers produced by him and referred to in those depositions. Mr. Kirk is a member of the law department of libelant company, who was in charge of those transactions.

Our determination of the losses from the above accounts figure out as follows:

Invoice value of cattle		$17,350.10
GROSS RECEIPT FROM SAVED CATTLE:		
149 head @ $20.00	$2,980.00	
50 " shipped @ $75.00	3,750.00	
		$6,730.00
LIABILITIES:		
Cost of feed stuff and help	2,283.82	
Freight on 50 head	1,250.00	
		$3,533.82
Net balance on these transactions		$3,196.18
This balance of $3,196.18 was divided between libelant and Central American Cattle Company, Inc., who furnished pastures and incurred other expenses, such as representatives to superintend care of cattle, etc., details of which were not kept. This division gave libelant		$ 1,598.09
TOTAL LOSS		$15,752.01

This balance does not take into consideration expenses of representatives and other services incurred by libelant, performed herein, but of which no detail account has been kept. (Kirk, Tr. p. 175.)

So, therefore, libelant believes it is justly entitled to receive from the steamship "Fort Morgan," and on her release bond, at least the sum of fifteen thousand seven hundred fifty-two 01/100 dollars ($15,752.01), plus legal interest from judicial demand.

The claim for damages, set up in the libel, was based upon the value of the cattle at Jacksonville, Fla., plus freight. But, as the claim for freight was in error, it not having been paid, that item is eliminated; and as the value of the cattle is, under the terms of the bill of lading sued on herein, to be taken at their invoice value, the losses should have been computed on that basis, a total of seventeen thousand three hundred fifty dollars and ten cents ($17,350.10).

Then, too, the libel was filed long before it became apparent that any net recovery would be had in the care and handling of the maimed and sickened cattle saved from the disaster. So that this element is, also, to be now considered.

Taking the apparent net value derived from caring for and handling the saved cattle "*for account of whom it might concern*" (Tr. p. 155), as shown above, at three thousand one hundred ninety-six dollars sixty-eight cents ($3,196.68), of which sum libelant, for all its services in the premises received and agreed to receive one-half thereof; the other half going to the party furnishing the pastures and affording other services, would, apparently, we submit, in no event, justify any further deduction from libelant's demand than the said one-half, or say one thousand five hundred ninety-eight dollars and nine cents ($1,598.09) which will leave a balance to libelant herein of fifteen thousand

seven hundred fifty-two dollars and one cent ($15,752.01).

The allowance of that one-half of the apparent net proceeds from said cattle being one thousand five hundred ninety-eight dollars and nine cents ($1,598.09) to libelant, cannot compensate for the cost incurred in having proper inspection of the said cattle made by its representative, the sending of a supercargo to the scene, exercising a measure of supervision over the maimed and sickened cattle, but for all of which, however, no distinct account was kept.

Whether or not, when libelant made its second contract with the Central American Cattle Company, Inc., which afforded to libelant certain benefits and advantages in other matters entirely foreign to this case, it did pay the sum of nineteen thousand dollars ($19,000.00), which included the aforesaid price of seventeen thousand three hundred fifty dollars ($17,350.00) for the cattle shipped on the steamship "Fort Morgan," which sum libelant was bound to pay as of the date of the actual shipment of the said cattle, we submit is something entirely beside the question of how much the "Fort Morgan" should pay under the terms of the bill of lading, because of the damage occasioned by its own unseaworthiness, which involved a gross breach of its own warranties, etc.

We respectfully submit that the liability of the "Fort Morgan" is fixed by the terms of the bill of lading which was executed by her master, and by her master personally delivered on shipboard to libelant's representative (Mitchell, Tr. p. 149).

VIII.

In re libelant's contention that because of the existence of a contract between Armour & Company and the Central American Cattle Company, stipulating two distinct separate, several obligations, one of which for sale of cattle f. o. b. a steamer; the other of which making libelant as the vendee the shipper of said cattle, as his own, and providing for ocean transportation in suitable steamer at ocean freight rate, etc., bars this suit although brought on a bill of lading issued to libelant as the shipper of its cattle destined for delivery to it at Jacksonville, Fla., a bill of lading executed on shipboard to libelant's agent.

We respectfully submit that the issue raised is absolutely without merit, and but for the fact that this matter is set up in respondent's answer as an issue, we would pay no attention thereto. But, believing that each issue raised should be discussed in our brief, we submit the following, with apologies to the Court for trespassing upon its time in this irrelevant matter.

The Central American Cattle Company took the steamship "Fort Morgan" under charter for services as a common carrier, under date August 23, 1917, for a period of one year (Tr. pp. 70-78), and as such a carrier employed her between American, Cuban, Mexican, Costa Rican and other Gulf ports, in transportation of cattle, lumber, sugar and other merchandise and passengers. During this time, that is to say, on the third day of October, 1917, the said Central American Cattle Company and Ar-

mour & Company entered into the referred to contract for two separate, several and distinct services, to-wit:

First: The Central American Cattle Company agreed to procure cattle and bring them to Port Limon, Costa Rica, or other ports agreeable to parties, where their physical condition would be examined to make certain they would pass inspection at United States port; wherein Armour & Company agreed to pay for those *accepted at said Port Limon.* Payment to be made to the Central American Cattle Company upon receipt of cable advice at New Orleans, specifying the number and weight of cattle accepted and loaded on the steamer. This was for a sale of cattle f. o. b. the steamer at a stipulated price based upon actual weights made at time of delivery on shipboard, and from that time on the supercargo, appointed by libelant, looked after libelant's interest on shipboard in line with those duties only which appertain to those of a super-cargo.

This provision, we respectfully submit, settled the question of purchase and ownership in said contract (Tr. pp. 79-80); because, just as soon as accepted at Port Limon f. o. b. the steamer, Armour & Company then and there became liable for the agreed purchase price and incurred the advantages and liabilities of owner. So here ended the buying and selling feature of the contract. In fact, in this case, when the cattle was so delivered, libelant's agent issued a receipt therefor, accepted them for libelant and on the same day appeared before the American Consul and made affidavit that Armour & Company were the owners of said cattle, and declared their phy-

sical condition (see Tr. pp. 186-187). Manifestly, here ended fully and completely the buying and selling feature of the contract. Then in respect to this cattle, which became the property of libelant when and as above stated the said American Cattle Company, Inc., treating Armour & Company as such owner and shipper further stipulated in the said contract as a distinct, several obligation, as follows:

SECOND: That the Central American Cattle Company would charter and equip one or two steamers for carriage of cattle; with all such equipment to be at the expense of said Central American Cattle Company, or the steamship company, to satisfaction of insurance inspector, with further stipulation for ocean freight care and ventilation of cattle, watering and feeding them, etc. In fact, the usual provisions for ocean transportation of cattle, with stipulations for dockage, demurrage, etc. No particular ship is named. In the instant case the shipment was made on the "Fort Morgan," and bill of lading was issued by the master of that ship covering this shipment. Libelant contends that receiving the cattle on board and entering upon the obligation to transport and deliver them, even independent of the bill of lading, did, as to the steamship "Fort Morgan," create the liability of a carrier.

So, we respectfully submit that the aforesaid agreement with its two entirely separate undertakings, in so far as this suit is concerned, particularly, shows a conclusion of the sale feature, leaving only the separate, severable ocean transportation maritime stipulation and question of jurisdiction is not involved therein.

But aside from all of this, since the suit is not in any way directly or indirectly based upon that contract, but is brought solely and exclusively upon libelant's right arising under its shipment and the bill of lading aforesaid, we respectfully submit that there was no good reason for the bringing in of that contract; and we further respectfully submit that the existence of said contract cannot in any way impair libelant's right to hold the steamship "Fort Morgan," a common carrier, responsible for damages done to libelant's goods, accepted on board of that vessel by her master, for transportation to a given destination, with the implied warranty arising from such acceptance by the master, that the ship was in a condition suitable for the proper transportation of those goods.

As was well said:—

> "The ship, however, would be answerable for any negligence that caused damage to the cargo after its shipment on board; that is to say, it would be answerable to the shipper upon the implied contract to transport safely, and that there should be no unreasonable delay in commencing and prosecuting the voyage after the cargo had been received by the vessel. 1 Pritch. Adm. Dig. p. 492, Sec. 223; The T. A. Goddard (D. C.) 12 Fed. 174; The Euripides (D. C.) 52 Fed. 161. And 'a person whose goods are transported by contract with a charterer, in a chartered vessel, navigated by her owners, is not limited, in case of loss or injury to his goods, to his remedy against the charterer on the express contract with him, but may directly pursue the vessel or her owners, who have caused the loss.' The T. A. Goddard, supra; New Jersey Steam Nav. Co. v. Merchants' Bank, (6 How. 344, 12 L.

ed. 465." The Hiram, 101 Fed. R. 138, at pages 140-141. See also, The Waterwitch 19 How. Pr. 241, affirmed in 1 Black, 494; The Peytona, 2 Curt. 21, 27, etc.

IX.

Respecting contention by the Fort Morgan Steamship Company that a settlement of a certain suit brought by the Central American Cattle Company against libelant under the terms and conditions of a certain contract made between said parties operates as a bar to this suit against the steamship "Fort Morgan."

Here, again, has been interjected an issue, which, we respectfully submit, has no rightful place in this suit; and, again, because raised as an issue, we feel we should discuss it, we do so, with due apology to the Court for thus trespassing upon your valuable time.

Within a few hours after the cattle were accepted by libelant f. o. b. the "FORT MORGAN," she had sailed from port and returned in a nearly capsized condition; her voyage broken up and with heavy loss of cattle. So, before libelant could make payment of the price of such cattle, upon cable advice of the amount thereof, it was advised by another cable of the disaster with consequent loss. Hence, libelant declined to pay the stipulated price to which the Central American Cattle Company had coupled a demand for the full freight, which was payable lost, or not lost.

Armour & Company required time to investigate the situation, and pending this investigation the American Cattle Company brought suit against them to recover such sums.

Then, too, libelant brought suit against the "FORT MORGAN" for value of the cattle.

A new contract was made by and between the Central American Cattle Company, Inc., and libelant respecting payment of the purchase price of said cattle, and for further sales with stipulation, for shipment thereof by certain steamers, etc.

The said contract is solely between the American Cattle Company and libelant, and neither the said Fort Morgan Steamship Company or the said vessel is party or privy thereto.

Said contract does not in any way release said Central American Cattle Company of any rights the said steamship or its owners may have against it; nor does the Central American Cattle Company urge it in defense of the action of the Fort Morgan Steamship Company in bringing them into this cause, to pay over to the said Fort Morgan Steamship Company any sum libelant may recover on its action herein.

No claim or demand has been set up by libelant against the said Central American Cattle Company, nor has libelant released said cattle company of any liability it may have in the premises.

LAW.

In the submision of what we believe to be the law of this case we will first submit those authorities which bear upon the rights of an owner who has shipped his goods by a common carrier to hold that ship responsible, *in rem*, for any damage sustained by those goods due to the unseaworthy condition of that vessel irre-

spective of whether the master has signed a bill of lading solely and exclusively as master or whether he has signed for the charterers or whether the charterers have signed, or even if no bill of lading be issued at all. That the authorities hold a responsibility on the part of the ship flows from the very act of the master in receiving the goods on board for transportation and delivery. That the moment the goods are on board and in the custody of the master the obligation between the ship and cargo is mutual and reciprocal, each being bound to the other. The ship, in every instance, being held for damages resulting from its own unseaworthiness where that condition existed at the time of the commencement of the voyage, whether the vessel be under charter or not.

We submit as a well considered case bearing directly upon the issues involved in this cause the case of *Olsen v. United States Shipping Company, 213 Fed Rep., pp. 20-21*, determined in the United States Circuit Court of Appeals, for the Second Circuit, with Circuit Judges Lacombe, Ward and Rogers presiding, wherein the Court held as follows (Italics all through are ours):

> "The consignee of the cargo at Aberdeen sued the ship owners for the value of the cargo jettisoned, who, in pursuance of correct legal advice, paid the claim. The District Judge allowed all these claims of the owners on the ground that they resulted from the improper loading, which was done by the charterer and which the charterer insisted did not affect the steamer's seaworthiness. This was, in our opinion, error. It is true that when charterers load cargo against the

protest of the master, in such a way that it is itself damaged and/or damages other cargo the charterer will be liable. The Centurion (D. C.), 57 Fed., 412. Likewise, when cargo loaded on deck by agreement is lost because of a peril of the sea the ship will be excused. Lawrence v. Minturn, 17 How., 100, 15 L. Ed., 58. We are not willing to extend this to such a loading as makes the ship herself unseaworthy when no peril is encountered. *It would, in our opinion, be unwise and dangerous to impair the implied warranty of seaworthiness of the ship herself.* The District Judge rightly held that the steamer was unseaworthy on leaving Ship Island. The jettison was caused not by sea peril, but by her own instability. *It makes no difference whether this was due to the amount of the stowage of the deckload alone or also to the fact that the largest ballast tank could not be filled. All these matters were under the absolute control of the master and it was his duty to see that they were right. It was no excuse to him that the charterers did the loading;* insisted upon his taking the deckload or that surveyors certified that the ship could do so safely. No doubt both thought so. That, however, did not lessen his duty, especially in view of the fact that he did not think so himself.

"The owners seek to sustain the decree on various grounds. They say that the warranty of seaworthiness was satisfied if the ship was seaworthy when the voyage began, which they say was at New Orleans, as she certainly was. *If this be admitted, it will be no excuse to the owners if the master subsequently made or allowed others to make the vessel unseaworthy.*

"Then they rely on such analogies as landsmen requiring builders or manufacturers with whom they contract to use certain material or follow certain construction which results in loss. Such relations have no resemblance to the relation of vessel and cargo or to the supreme authority of the master of a ship. There is no such warranty as that of seaworthiness and the builder or manufacturer has no such absolute authority or duty as has the master of a vessel.

"They rely also on Article 30 of the charter providing that the deckload shall be at the charterer's entire risk, *but this does not cover a risk caused by the unseaworthiness of the vessel.*

"Then they say that clause 9 in which the charterers indemnify the owners against any liability arising from the bill of lading entitles the owner to recover. But the bill of lading did not increase the liability of the owners under the charter party. Indeed it restricted it. *The cargo did not belong to the charterers and if it did, the owner's liability for unseaworthiness would be exactly the same.*

"Finally cases are cited in which charterers were owners *pro hac vice* and therefore could not reclaim because of unseaworthiness caused by themselves. Obviously they have no application."

Another case, which we believe exhausts the leading authorities on the subject, and bears directly on this case is that of *The Esrom, 272 Fed. Rep., p. 266*, we cite therefrom fully, beginning with paragraph 2, and extending through paragraphs 2, 3 and 4, p. 271; determined in the United States Circuit Court

of Appeals for the Second Circuit with Judges Ward, Hough and Manton sitting, the Court said (Italics ours):

> "The ship may be held liable *in rem* for damages to the cargo, *even though no bill of lading or contract ...of ...affreightment was signed by the master.* A shipowner may be held to the common-law liability. In Brower v. Water Witch, Fed Cas. No. 1971, affirmed 66 U. S. (1 Black), 494, 17 L. Ed., 155, it was held that where a shipment of cotton was damaged, even if no bill of lading or other agreement was entered into by the master, the receipt of the merchandise, by the vessel consenting to its being loaded for a port of destination, subjected the ship to liability; that the agents of the charterers in whose services the brig was at the time, and who were interested in procuring cargoes, and who entered into an agreement fixing the terms upon which the shipment was to be made, made the vessel bound by such agreement. The obligation is imposed as a common-law obligation of the carrier. In The Euripides (D. C.), 52 Fed., 161, it was said:
>
> " 'But the liability of the ship would be the same without any bill of lading. The original charterers undertook to transport these goods; this was done by the authority and consent of the shipowners, for such was the very object of the charter. *The ship is therefore answerable for any negligence that causes damage to the goods, and is answerable to the shipper, or to his vendee, upon the implied contract to transfer safely, whether a bill of lading is issued or not.*'
>
> "In the Centurion (D. C.), 57 Fed., 412, Judge Brown said (Italics ours):
>
> " '*The charter includes nothing that even*

by implication excludes the ordinary security of a lien in favor of the cargo against the ship for the performance of the ship's duties in the business for which she was chartered. The ship is therefore liable for bad stowage, because the duty to stow properly is one of the duties of the carriage which the owner has expressly authorized. The Freeman v. Buckingham, 18 How., 182; Niagara v. Cordes, 21 How., 7. The ship is liable for damage from bad stowage, whether the stowage is done by the owners' agent *or the charterers', and equally so whether there is any bill of lading or not.* It was therefore immaterial whether the bill of lading was signed by the master or by the charterers.'

"In the case of The Sprott (D. C.), 70 Fed., 327, a steamer was held *in rem* for damages to cargo which was carried on deck although the bills of lading were signed by the charterer. It was there said:

" 'I do not think it is any defense to the ship that the bill of lading signed by the master recited the shipment of all the cargo as having been made by the charterers. The ship is not entitled to claim from that circumstance that it was dealing with the charterers alone, and had no privity with the actual shippers. For the master knew to the contrary. His own bill of lading recited the actual shippers, and he knew that the usual bills of lading had been given to those shippers on the ship's account. To suffer the ship, therefore, to deny any privity with the actual known shippers, under cover of a single bill of lading given to the charterers as sole shipper, would be to uphold a mere subterfuge, and a virtual fraud upon the shippers; since the ship's bills of lading were

given to shippers with the master's knowledge and concurrence, and on his account. The master, knowing that clean bills of lading had been given for the 163 bales, knew that the charterers had no authority to ship them on deck at shipper's risk. His own bill of lading to the charterers, with that exception inserted, is therefore, no protection to him or to the ship; and if he repudiates the bill of lading signed in his behalf by the charterers, as respects goods other than the charterers' goods, he is in the situation of a master who has received goods for transportation without giving any bill of lading for them at all; and upon that theory he would be bound to carry the goods in the customary manner; that is, under deck. The Delaware, 14 Wall., 579.'

"*If negligence were proved, or fault shown, the Esrom would be responsible to the libelant independent of the form of contract of affreightment, or even though the bill of lading was not signed by the master.*

"There were reciprocal liens between the Esrom and the cargo of prunes, which arose at the time the cargo was received on board and obligations were then imposed. In Vandewater v. Mills, 60 U. S. (19 How.), 82, 15 L. Ed., 554, it was said:

" 'But this duty of the vessel, to the performance of which the law binds her by hypothecation, is to deliver the cargo at the time and place stipulated in the bill of lading or charter party, without injury or deterioration. If the cargo be not placed on board, it is not bound to the vessel, and the vessel cannot be in default for the non-delivery, in good order, of goods never received on board.'

"But the obligation between the ship and cargo is mutual and reciprocal, and does not attach until the cargo is on board or in the custody of the master. The Lady Franklin, 75 . S. (8 Wall.), 325, 19 L. Ed., 455; Scott v. Ira Chaffee (D. C.), 2 Fed., 401. This rule is not inconsistent with the authorities cited, which hold that the vessel's lien upon the cargo is subject to be defeated if, before the vessel breaks ground, she becomes unseaworthy or disabled and unable to finish her voyage. Tornado, 108 U. S., 342, 2 Sup. Ct., 746, 27 L. Ed., 747; Eugene Viesta (D. C.), 28 Fed., 762. But the lien of the vessel upon the goods and of the goods upon the vessel attaches from the moment the goods are laden on board, and not from the time only when the ship breaks ground. Bird of Paradise, 72 U. S. (5 Wall.), 545, 18 L. Ed., 662; Bulkley v. Naumkeag Co., 65 U. S. (24 How.), 386, 16 L. Ed., 599.

"This Court said in National Steam Nav. Co., Ltd., v. International Paper Co., 241 Fed., 862, 154 C. C. A., 565:

" 'The obligation of the ship to carry, and of the shipper to pay for the carriage, accrues when the goods are delivered to the ship.'

"*The obligations which are created one to the other, then, are that the ship is bound not to injure the merchandise by improper stowage or rough handling, and, if she does, then there will be a liability in rem, even before the voyage is begun. If the voyage is begun, the vessel must carry the goods to destination on the terms agreed by the shipper with the charterer; for when the vessel starts upon the voyage, by implication, there is a ratification and adoption by the ship of*

> *the charterer's contract with the shipper.* Then the shipper is deprived of an opportunity to retake his goods, and the goods are in the sole possession and control of the ship. So, too, the ship is then bound by the charterer's bill of lading, under which the freight is prepaid, and cannot collect further freight at destination. The Ada (D. C.), 233 Fed., 325. Before sailing, the vessel owner is protected by his opportunity to refuse to carry the goods on the terms agreed by the charterer before the voyage is commenced."

Judge Ward filed a dissenting opinion in the above case, contending that the ship's liability was even greater than that announced in the majority opinion. But, as stated by Hand, J., in The Poznan (276 Fed. R., par. 12, p. 432), referring to the above case of The Esrom, says:

> "*it was agreed by all the Judges that the* charterer's bill of lading bound the ship."

In the case of the *Aktieselskabet Fido v. Lloyd Brazileiro, 288 Fed., p. 62*, determined in the United States Circuit Court of Appeals, for the Second Circuit, before Rogers, Hough and Manton, Circuit Judges, the Court said:

> "Even if a case of improper loading had been made out, it would only prove that the masters were negligent in permitting the coal to be so loaded, and the owners of the ship would be responsible, as the negligence of their agents, the masters, would be imputable to them, and they would not be entitled to recover. In Olsen v. United States Shipping Co., 213 Fed., 18, 129 C. C. A., 607, the owner of a vessel sought to recover damages

from the charterer because of improper loading. We held in that case that there could be no recovery, and that the matter of loading was under the absolute control of the master, and that it was his duty to see that the cargo was properly loaded, and that it was no excuse to him that the charterers insisted on loading in an improper manner."

In *The Poznan, 276 Fed. Rep., p. 432* (S. D. N. Y., Judge Hand), the Court held in paragraph 12, as follows (italics ours):

"(12) *The last question is of the parties liable. First, of the ship.* The charter party did not provide that the master should sign the bills of lading; that clause in the printed form being struck out. By an addendum it provided that the Acme Company should issue no bill of lading until the freight had been paid to the Polish Company. Thus the charter party clearly contemplated bills of lading running in the name of the Acme Company, and they all so read. Most of them were in fact signed by the Company, but a few by the master. *So far as concerns the ship,* it makes no difference. *Being once laden she was bound for right delivery though the charterers sign.* The Euripides (D. C.), 52 Fed., 161; The Centurion (D. C.), 57 Fed., 412; The Freda (D. C.), 266 Fed., 551. In the Esrom (No. 2), 272 Fed., 266 (C. C. A. 2nd), February 24, 1921, *it was agreed by all the Judges that the charterer's bill of lading bound the ship for right delivery.* Indeed, *the cargo would have a 'privilege' against the ship for right delivery, even without any bill of lading.* The Saturnus, 250 Fed., 407, 162 C. C. A., 477, 3 A. L. R., 1187."

BURDEN AS TO SEAWORTHINESS AND WHAT IS UNSEAWORTHINESS.

In the case of *The Oneida, 128 Fed. R., 687,* before Wallace, Townsend and Coxe, Circuit Judges, the Court held:

> "In a suit to recover for loss of cargo by the sinking of a ship, the burden of proving seaworthiness at the beginning of the voyage rests with the shipowner."

The Court further held:

> "We concur in the conclusion of the District Court that THE ONEIDA was unseaworthy when she left Charleston. A few words only need be added. The burden was upon the claimant to show that the vessel was in a fit condition to transport the cargo undertaken to be carried: in short, that she was seaworthy. The Southwark, 191 U. S., 1, 24 Sup Ct., 1, 48 L. Ed.,—. This burden has not been sustained. The Oneida was not in a fit condition to carry her cargo to Boston, Mass., having in view all the conditions reasonably to be expected during the voyage. At the time she broke ground she had a starboard list of eight or nine degrees, and within twenty-four hours thereafter she rolled over and took an equal list to port. This list increased until the morning of the 20th of September when she again turned to starboard with a list of fifteen degrees. This condition cannot be accounted for either by the state of weather or the slight shifting of the cargo. The instability indicated at Charleston steadily increased as the ship continued her voyage. In the nature of the case this was inevitable and must have been known to her master at the time. The coal and water were

stowed below the center of gravity and as these were consumed the tendency to become topheavy increased. It cannot be said that a vessel is in a seaworthy condition which has at the inception of her voyage little, if any, positive metacentric height, a list of eight or nine degrees, and her cargo weight so distributed that her instability must increase as she proceeds. Perhaps the most persuasive proof of her inability to reach her destination safely is found in the fact that the list increased so rapidly that on the morning of the 21st, when there was a starboard list of 20 degrees, her master, fearing that she would be unable to reach Boston, put into the port of New York in distress."

In *W. J. McCahan Sugar Refining Company v. Steamship Wildcroft, 201 U. S., 376; 50 L. Ed., page 794, at page 797*, the Court says:

"We are very clear that this is not a case where the findings of the Court below can be disturbed, as was our conclusion in the case of The Southwark, *supra*, relied upon by the petitioner, where it was shown that the damage inflicted was the result of unseaworthiness in respect to a condition which a proper inspection of the vessel at the beginning of the voyage would have discovered and remedied. We, therefore, reach the conclusion that the decree of the Circuit Court of Appeals should be affirmed and but for its construction of the rule of evidence in causes of this kind this opinion might well end here. But we are unable to agree with the views expressed in the opinion of the learned Circuit Court of Appeals to the effect that where a shipowner seeks the protection of the immunity afforded by the Harter Act under p.

3, reliance may be had upon the presumption of law that the vessel was seaworthy at the beginning of the voyage, and that it is only in cases of conflicting proof that the burden is imposed upon the shipowner of establishing by testimony the seaworthiness of the vessel, or due diligence in that behalf, in order to have the benefit of the act. We think this construction of the law is opposed to the terms and policy of the act, and contrary to the decisions of this Court heretofore announced, from which we see no occasion to depart. The relief afforded by the third section of the Harter Act to the owner of a vessel transporting property is purely statutory. In the case at bar there could be no question as to the liability of the vessel owner from the established facts of the case, but for the immunity afforded by that act. To permit a cargo of sugar to be injured by the introduction of fresh water in the manner shown, but for the provisions of this act, would have made a case of clear liability against the owner; and where the statute has given immunity against such loss by reason of error in navigation or management, it does so upon the distinct condition that the owner shall show that the vessel was in all respects seaworthy and properly manned, equipped, and supplied for the voyage; or, if this cannot be established, that he has used due diligence to obtain this end. The discharge of this duty is not left to any presumption in the absence of proof. It is the condition precedent, compliance with which is required of the vessel owner in order to give him the benefit of the immunity afforded by the act. The reason for requiring this proof by the owner is apparent. He is

bound to furnish a seaworthy and properly equipped ship for the purpose of the voyage. Whether he has done so is a matter peculiarly within his own knowledge. The inspection which he can give, but which the shipper cannot give, for lack of opportunity, will establish whether this duty has been complied with. The whole matter is in the control of the owner. The law says, in substance, that when the owner can show he has discharged this duty he shall be relieved from errors of navigation and management on the voyage, over which he has not such direct control. It is not a case where there is either the necessity or propriety of resorting to presumptions. It is only when he has discharged the burden which the law imposes upon him, and shown that he has furnished a vessel, fit and seaworthy, or has used due diligence to that end, that the law relieves him of the liability which he would otherwise incur. This construction of the statute has been more than once announced in the decisions of this Court, recently in International Navigation Co. v. Farr & B. Mfg. Co., 181 U. S., 218, 226; 43 L. Ed., 830, 833; 21 Sup. Ct. Rep., 591, in which this Court, speaking through Mr. Chief Justice Fuller, said: 'We repeat, that even if the loss occur through fault or error in management, the exemption cannot be availed of unless the vessel was seaworthy when she sailed, or due diligence to make her so had been exercised, and it is for the owner to establish the existence of one or the other of these conditions.' This case was quoted followed in the still later case of The Southwark, *supra*, in which it was reiterated that the burden was upon the vessel owner to show by reasonable and proper tests that the

vessel was seaworthy and in a fit condition to receive and transport the cargo undertaken to be carried, and that if, by failure to adopt such tests and furnish the required proof, the question of the ship's seaworthiness was left in doubt, that doubt must be resolved in favor of the shipper, because the vessel owner had not sustained the burden cast upon him by the law to establish that he had used due diligence to furnish a seaworthy vessel.

"While we, therefore, accept the decision of the learned Circuit Court of Appeals as to the facts in this case, we do not wish to be regarded as sanctioning any relaxation of the rule above stated, already laid down in the prior decisions of this Court. Decree affirmed."

In *Sumner v. Caswell, 20 Fed. Rep., 252-3*, the Court says:

* * * "Besides the express contract that the vessel should be fitted for the voyage, there was also the warranty implied by law under the bills of lading, as well as incident to the charter and a part of every such contract, that the ship, at the time she sailed, was in all respects seaworthy and fit and competent for the sort of cargo and the particular service for which she was engaged. 3 Kent, 205; Macl. Ship, 405; Work v. Leathers, 97 U. S., 279; The Rebecca, 1 Wave, 192; The Lizzie W. Virden, 19 Blatchf., 340; S. C., 11 Fed. Rep., 903; Cohn v. Davidson, 2 Q. B. Div. 455."

In the case of *The Benjamin Noble, 244 Fed. Reporter, 95 (C. C. A.)*, the Court said:

"It is, however, urged that the 'Noble' was not a common carrier, but a private carrier,

since the whole cargo belonged to appellee and the boat was not running on regular routes or held out as a common carrier, and consequently that she was not subject to the rule pointed out touching the burden of proof. Conceding though it is not necessary to decide, that the 'Noble' was a private carrier, the position of appellant is not changed; for, as we have seen, the burden of proof was not cast upon appellant. Furthermore, we see no reason for distinction between a private carrier and a common carrier as respects the question or the proofs as to seaworthiness, since the obligation of each to furnish a seaworthy boat is the same. Sumner v. Caswell, *supra*, 20 Fed., pp. 251-252; The Planter, 19 Fed. Case No. 11,207-A, 807-808, C. C."

———o———

Owners Obligation Under Charter Party, Which Document Was In Force Long Before the Charterers Made Any Contract with Libelant, and to Which Libelant Was Not a Party.

The form of charter party filed in this case, as entered into between the "owners" and the Central-American Cattle Company, Inc., provides merely a charter for the use of the ship in respect to cargo space and accommodations for passengers. The owner retains command and control over the vessel, they appoint all the officers and crew.

Under such a form of charter, as exists here, it is said by *Carver on Carriers of Goods by Sea (Sixth Ed., p. 170, Sec. 112)*:

"Most commonly, however, charter-parties are made for the purpose of securing to the

> charterer the *use* merely of the ship on a particular voyage or series of voyages. He does not desire to interfere with the manner in which she is to be navigated, nor is the shipowner willing to part with his control over her. The charterer is content with the owner's undertaking that the voyage shall be performed, and that the vessel's services shall be at his disposal. The whole control and management of the ship is therefore left undisturbed in the hands of the owner, who remains in possession by his servants, the master and crew. In such a case the shipowner acts as a carrier of the goods upon the agreed terms."

Speaking of such charter-parties which expressly stipulate that the master shall sign bills of lading, as required by the charterers, *Carver on Carriage of Goods by Sea (Sixth Ed., p. 222, Sec. 156)*, says:

> * * * "Such a charter-party provides that the owner shall give the use of his ship to the charterer; and one agreed manner of doing this is, that the goods of third persons shall be carried, for the charterer's profit, if any can be got, under bills of lading to be signed by the master. The provision that the master shall sign the bills of lading is not a mere authority to him to do so, it is an agreement that he shall do so, for breach of which the owner is liable to an action by the charterer. That provision, also, is nearly always accompanied by the qualification that the bills of lading are to be signed 'without prejudice to this charter-party'; which indicates that the shipowner is meant to be bound by the bills of lading, though not so as to affect his rights against the charterer. And as will

> appear later, whether or not there is the above qualification, the charterer will be bound to indemnify the shipowner for any liabilities imposed on him by the bill of lading signed by the master at the request of the charterer, in excess of the liability under the charter-party.
>
> "The meaning, then, of the stipulation that the master shall sign bills of lading seems to be that the shipowners shall, through the master, contract with shippers, for the charterer's benefit, and not that the master shall do as agent for the charterer. The master signs not exactly as agent of the charterer, but because he is bound to sign by reason of the charter-party."

Other text-book writers can be quoted, and numerous cases cited in support of the foregoing, but this Court, of course, having determined these long-settled principles of law, the only reason for setting out the above citation is because of claimant's contention.

But, after all, it is an indisputable fact that the cargo was lost by reason of the unstable, unseaworthy condition of the ship, which existed prior to and at the time of the commencement of the voyage. A condition due to the failure of the master of the ship, to have and keep the ship in proper condition for sailing, and not to have sailed in its then unseaworthy condition. The neglect of the master in this respect was the neglect of the owners' agent, who was especially appointed by the owner to discharge this and other duties appertaining to the care and navigation of the ship; and his negligence in the premises certainly imposes a liability upon the ship and its owners to the same ex-

tent that fault on his part in causing a collision with another vessel would have made his vessel answerable to cargo owners for damage sustained by them to their cargo through such fault.

Petitioners respectfully pray that the judgment of the lower Court be set aside, and that this Honorable Court will decree judgment in its favor for the measure of damages suffered in the premises.

JOHN D. GRACE,
M. A. GRACE,
EDWIN H. GRACE.

New Orleans, La., December 23, 1925.

ADDENDA

Although it conclusively appears that the ship was in a grossly unseaworthy condition at the time her master received petitioner's cattle on board, and executed a bill of lading therefor, signing for the charterer, the Honorable, the Circuit Court of Appeals for the Fifth Circuit, in their decree which appears in 297 Fed. R. 813, says:

> "As above shown, the bill of lading was subscribed by the Cattle Company only, 'by Tho. Johannsen, master S/S Fort Morgan.' That signature indicated the absence of intention to bind anyone but the charterer by the bill of lading. The act of the master in so subscribing the instrument, does not indicate a purpose thereby to bind the ship or its owner." (Tr. p. 470.)

But directly opposed to the above holding, the United States Circuit Court of Appeals for the Second Circuit, with Judges Ward, Hough, and Manton, presiding, in The Esrom, 272 Fed. R. p. 269, after a most learned and exhaustive review of the authorities, says:

> "If the voyage is begun, the vessel must carry the goods to destination on the terms agreed by the shipper and the charterer; for when the vessel starts upon the voyage, by implication, there is a ratification and adoption by the ship of the charterer's contract with the shipper."
>
> "* * * Before sailing, the vessel's owner is protected by his opportunity to refuse to carry the goods on the terms agreed by the charterer before the voyage is commenced."

II.

In the last quoted case it is further said:

> "The ship may be held liable in rem for damages to the cargo even though no bill of lading or contract of affreightment was signed by the master."

The lower court is again in direct conflict with other Circuit Court of Appeals, as will presently be shown, when it holds that:

> "The appellant is not entitled to hold the ship or its owner liable for a breach of duty imposed by the contract for the carriage of the cattle, as appellants' contract for such carriage was with the charterer, the Cattle Company, alone." (Tr. p. 470.)

But the breach of duty referred to by the court was the unseaworthiness of the ship, itself, which was warranted by her owners to be tight, staunch, strong and seaworthy in every respect; a warranty, too, which is implied by law when not expressed.

Respecting this point the United States Circuit Court of Appeals, for the Second Circuit, before Judges Lacombe, Ward and Rogers, presiding, in the case of Olsen v. United States Shipping Company (213 Fed. R. pp. 20-21) held:

> "It would, in our opinion, be unwise and dangerous to impair the implied warranty of seaworthiness of the ship, herself. The district judge rightly held that the steamer was unseaworthy on leaving Ship Island. The jettison was caused not by the sea peril, but by her own instability. It makes no difference whether this was due to the amount

> of the stowage of the deckload alone or also to the fact that the largest ballast tank could not be filled. All these matters were under the absolute control of the master and it was his duty to see that they were right. It was no excuse to him that the charterers did the loading; insisted upon his taking the deckload or that surveyors certified that the ship could do so safely.

The lower court cites Carver on Carriage by Sea and a case referred to by said author, but those citations were inadvertently erroneously cited, as neither citation bear on this case. But Carver on Carriage by Sea is, in fact, directly in line with the C. C. A., 2d Circuit (Sect. 17). The case of the Posnan, the only other decision referred to by the lower court, is directly, squarely against the opinion of the lower court. (See the Posnan, paragraph 12, 276 Fed. R. 432.)

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925.

No. ~~537~~ 135

ARMOUR & COMPANY,

Petitioners,

versus

FORT MORGAN STEAMSHIP COMPANY, LTD. (CLAIMANTS AS OWNERS OF THE STEAMSHIP "FORT MORGAN"), THE AMERICAN SURETY COMPANY OF NEW YORK, AND THE CENTRAL AMERICAN CATTLE CO.,

Defendants.

Supplemental Brief for Petitioners in Reply to Defendant Brief.

On Writ of Certiorari to the United States Circuit Court of Appeals, for the Fifth Circuit, from their Final Judgment Rendered March 18, 1924, Affirming the Judgment of the Lower Court (29 Fed. R., 813).

John D. Grace,
M. A. Grace,
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Petitioners.

MONTGOMERY-ANDREE PRINTING CO. INC., 907 CHARTRES, N. O.

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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1925.

No. 537.

Armour & Company,

Petitioners,

versus

Fort Morgan Steamship Company, Ltd. (Claimants as Owners of the Steamship "Fort Morgan"), the American Surety Company of New York, and the Central American Cattle Co.,

Defendants.

Supplemental Brief in Answer to Points Raised by Fort Morgan Steamship Co.

I.

Jurisdiction.

Defendant, the *Fort Morgan Steamship Company, Ltd.*, in raising the question of jurisdiction, most conveniently overlook the following facts:

(a) That this suit is brought solely against the S/S Fort Morgan, by the shipper, who is also consignee, upon an ocean bill of lading, executed by the master of that ship, a common carrier, for the charter of the vessel, for transportation of four hundred twenty

(420) head of cattle from Port Limon, Costa Rica, for delivery at Jacksonville, Fla.

(b) That, by the master's very receipt of libelant's cattle on board for said transportation, there was created an implied warranty that she was fit and strong, and in every way equipped, manned, etc., to make her seaworthy for the voyage undertaken, for proper delivery of said cattle at destination, which warranty was breached in this case. It was on account of damages occasioned by that breach, *and not otherwise*, this suit is brought.

(c) That there is not sought to be recovered herein any damages or losses on any contract or agreement other than on the bill of lading. The recovery sought herein is confined solely and exclusively to the damages which resulted as a consequence of the gross unseaworthiness of the said steamship, existing in her prior to and at the commencement of the said voyage by her undertaken, which unseaworthiness necessitated on her part an absolute, complete abandonment of the voyage she so undertook to perform, and a return to port in an almost capsized condition, within a few hours after her departure from said port of loading.

(d) Said defendants set up as a bar to admiralty jurisdiction a contract which they, themselves, have brought in, (Tr. 78-83) which was made between the Cattle Co. and Armour & Co., for sale of cattle f.o.b. the carrying vessel, at Port Limon, which contract further, as a several, distinct maritime obligation, provides that after the consummation of such sale has occurred, to then transport said cattle for Armour & Co. to Jacksonville, Fla., at "ocean freight" of $25.00

per head, subject to exception from certain maritime perils. *But that contract is not sued on in this case. No recovery is sought for under that contract. No relief of any kind is prayed for herein under that contract. The Fort Morgan Steamship Company is not a party or privy to that contract. It does not in any way or to any extent prevent Armour & Co. from elect ing to proceed against the Steamship Fort Morgan for damages occasioned by and through her gross unseaworthiness.* Nowhere, in any document in this cause, is that contract referred to, excepting, and solely excepting, that *the ocean freight charge* for the transportation of the cattle would be—as in said contract stipulated—$25.00 per head of cattle.

The Court will not confuse the above referred to contract (Tr., 78) with the Live Stock agreement (Tr., 83), referred to in the Bill of Lading which is purely maritime, and maritime alone.

(e) Said defendant in setting up the said contract made solely between Armour & Co. and the Cattle Company for two distinct several obligations—one for sale of cattle, the other obligation for transportation of cattle after the sale is consummated, hence, after all, a several distinct maritime transaction, conveniently overlooks the right, the long, well-settled right of the petitioner, as shipper and owner, to elect to proceed against the ship for its own defaults. As was well said in *The Hiram, 101 Fed. Rep., 138, at pp. 140-141:*

> "The ship, however, would be answerable for any negligence that caused damage to the cargo after its shipment on board; that is to say, it would be answerable to the shipper

upon the implied contract to transport safely, and that there should be no unreasonable delay in commencing and prosecuting the voyage after the cargo had been received by the vessel. 1 Pritch. Adm. Dig., p. 492, Sec. 223; The T. A. Goddard (D. C.), 12 Fed., 174; The Euripides (D. C.), 52 Fed., 161. And 'a person whose goods are transported by contract with a charterer, in a chartered vessel, navigated by her owners, is not limited, in case of loss or injury to his goods, to his remedy against the charterer on the express contract with him, but may directly pursue the vessel or her owners, who have caused the loss.' The T. A. Goddard, *supra;* New Jersey Steam Nav. Co. v. Merchants' Bank (6 How., 344, 12 L. Ed., 465)."

The Hiram, 101 Fed. R., 138, at pp. 140-141.

See, also, *The Waterwitch, 19 How. Pr., 241, affirmed in 1 Black, 494. The Peytona, 2 Curt., 21, 27, etc.*

Then, too, it would seem clear that the ship is bound by the bill of lading executed by her master, for the charterer, otherwise, in any event, as stated by the Circuit Court of Appeals, Second Circuit, in *The Esrom, 272 Fed. R., p. 266:*

"The ship may be held liable *in rem* for damages to the cargo, even though no bill of lading or contract of affreightment was signed by the master. * * *

"The ship is therefore answerable for any negligence that causes damage to the goods, and is answerable to the shipper, or to his vendee upon the implied contract to transfer safely, whether a bill of lading is issued or not."

For the owners to attempt to repudiate the bill of lading executed by the master for the charterer, they are in the situation of having their master accept goods for transportation without giving any bill of lading for them at all, and would thereby become bound by an implied contract to transfer safely, with an implied warranty of the ship's fitness to make the voyage.

We believe the foregoing remarks sufficient to clearly advise the Court of material facts on this question of jurisdiction.

II.

Fort Morgan Steamship Company's Suggestion That Armour & Co. Were Not Owners of the Cattle.

While said defendant suggests that the cattle lost and injured on board of the Steamship "Fort Morgan," due to her unseaworthiness, did not belong to libelant, and that ownership would not have vested in libelant until their delivery at Jacksonville, Fla., with much ingenious argument thereon to support said unjustified suggestion, said defendant most conveniently overlooked the fact that such contention is most positively disproved by each and every one of the shipping documents, receipts, consular document, etc., filed in this cause. For instance:

(a) Defendant conveniently overlooks the fact that when the cattle were delivered f. o. b. the steamship "Fort Morgan," with their weight previously ascertained by the Cattle Company, who was vendor, and by Armour & Co., who was vendee, that Mr. Mitchell, the agent of Armour & Co., did then and there,

and on behalf of Armour & Co., as purchaser, accept delivery of the said cattle, and stipulated their weight as 346,302 pounds, live weight, for which cattle at the agreed price of five cents per pound, said Armour & Co. then stood responsible and legally obligated to pay. That "received and accepted" receipt acknowledging said delivery is printed in full in Tr. 187.

(b) Said defendant still further conveniently overlooks the fact that the ocean bill of lading, executed by the master of the Steamship "Fort Morgan," for the charterer of the vessel, at the time when the cattle was delivered on board of his steamship, and by the said master counted, recites that Armour & Co. is the actual shipper, and that said cattle were accepted by the ship for delivery to said Armour & Co., at Jacksonville, Fla. That by this bill of lading the ship stood obligated to carry those cattle for the said shipper and make delivery thereof to them as therein specified. But because of her unseaworthiness, operating as a breach by her own and owners implied warranty of seaworthiness, she failed, and occasioned the damages complained of.

(c) Said defendant still again conveniently overlooks the fact that Armour & Co., by and through their said representative, having accepted delivery of the said cattle f. o. b. the steamer (Mitchell, Tr., 187), said representative of Armour & Co., as such, did then, at Port Limon, Porto Rica, appear before the United States Consul and make affidavit of the ownership and physical condition of the said cattle as required by the statutes of the United States necessary to enable said steamship to land said cattle in the United

States; and in said affidavit said agent of Armour & Co. did make oath that the said cattle then on board the Steamship "Fort Morgan," at that place, was the property of libelant, Armour & Co. That affidavit appears in full in the transcript at page 186.

(d) Said defendant still further conveniently overlooks the fact that Armour & Co., having accepted the cattle f. o. b. the steamer at Port Limon, as their own property, did take out insurance in their own name, for their own use and benefit, to protect themselves from loss or damage happening to the said cattle by or through "stranding, sinking, burning or fire, or collision." (Frisbe, Tr., 166.) Said policies of insurance were offered in evidence. (Tr., 166.)

III.

The Fort Morgan Steamship Company Also Sets Up As a Bar to Petitioner's Right to Recovery Herein the Fact That Petitioner Acquitted Its Obligation to Pay Its Vendee the Price It Owed for the Cattle and Made Other Business Arrangements.

Because of the losses sustained by libelant to its cattle almost immediately after the voyage commenced libelant withheld the draft which they were obligated to deliver to the Central American Cattle Company, Inc., at New Orleans, upon the cable advice which they had received of the delivery f. o. b. the aforesaid cattle and their live weight, intending to make due investigation into the cause of the loss. The Cattle Company, however, brought suit before such investigation was concluded, to recover the price of the cattle and stipulated freight, contending that under their contract

the sale was consummated when the cattle were delivered f. o. b. the steamer and that said sums were due and owing to them. They were the proper parties entitled to collect for their own account whatever freight might be payable, because, as charterers of the Steamship "Fort Morgan," they had paid to the owners of said vessel a lump sum charter of sixteen thousand dollars ($16,000.00), per calendar month, and, in turn, were accorded the right to collect the passage money and freight for passengers and on consignments taken and shipped on said vessel. Armour & Co. shortly thereafter entered into a compromise settlement of said suit with the American Cattle Company, wherein they paid for the cattle and made agreement to share in the expenses and profits, if any, to be derived from the sale of such cattle which survived and were cared for and treated, when taken over by the Captain of the Port at Port Limon, "for the account of whom it might concern," when the master voluntarily abandoned the voyage, returned to port, and there abandoned the cattle shipped on his vessel. *The freight was not paid.* This new contract above referred to embodied certain other provisions for future business between the Central American Cattle Company and libelant. But libelant did not relieve the charterers of or from any liability in the premises which might flow from them to the ship or her owners. So, whatever rights, if any, the owners of the Steamship "Fort Morgan" had against the Central American Cattle Company, the charterers of said boat, under the terms and conditions of the charter party, continued in full force and effect. This fact is clearly established by the petition of the Fort Morgan Steamship Company, which brought the said Central American Cat-

tle Company, Inc., into this very case as a co-defendant, so that, under the terms of the charter party, the owners of said vessel might have judgment over against the said Central American Cattle Company, Inc., if the Steamship "Fort Morgan" should be condemned and her owners be required to pay libelant's demand, if the charterers might justly be held responsible therefor. In their answer to that petition the Central American Cattle Company does not set up that they have made any kind or character of contract or agreement or settlement with libelants, which would release them from any obligation to answer over to the ship to make good libelants' losses, if they should be found responsible therefor, but, on the contrary, came squarely forward and denied the right of the owners of the "Fort Morgan" to recover from them, because, so they plead, the loss and damage was occasioned, not by reason of any fault on their part, but solely because of the unseaworthiness of the Steamship "Fort Morgan" existing at the time this cattle was received on board, prior to and at the commencement of her voyage. We urge it is too plain to admit of argument that the rights or interests of the owners of the "Fort Morgan" have not been impinged upon, or affected by reason of libelants making settlement with the Central American Cattle Company of the matters dealt with in said transaction between the parties referred to and that the said separate, independent agreement between the parties thereto does not affect the responsibility of the ship for her own defaults and consequent damage.

IV.

Defendant, Fort Morgan Steamship Company, Seeks to Show Seaworthy Condition of Vessel's Tanks, Not By Her Engineers, Who Were in Charge Thereof, For None of Them Were Produced, But by Mr. Olsen, a Surveyor, Whose Deposition in the Main Is Based Upon Reports to Him.

Mr. Olsen, for defendant, who manifestly made only a superficial survey, if *survey* it can be called, by which defendant is seeking to show a good condition of ballast tanks, testified as follows:

> (R. 383.) A. The nature of an examination like that would be, to fill the tanks, open the valves to the outside, so that the water could freely run in, and have a pressure on the tank to the water ballast line. * * *

But on same page this witness, further testifying, says that he personally made no soundings of the tanks, that he had a man going around to sound the tanks, who reported they were full.

On Tr., 384 says:

> A. As far as I remember, we were all in the cabin together with the captain and that was reported to me.
>
> Q. And you took that report as true and acted on it?
>
> A. Yes.
>
> Q. So that, of your own knowledge, you don't know really what water was in there?
>
> A. I couldn't swear what was in there exactly, but they reported that they were full.

At Tr., 386 he testifies that at the subsequent examination (none of which were for classification of the vessel):

> A. Yes, sir; there was one leak found between the afterpeak tank and the No. 3 tank just leading into the valve, between the afterpeak tank and the Number 3.
>
> Q. Just what, if anything, any of the officers may have done, or any one from shore may have done, to remedy any leaks or anything of that sort, that, of course, you don't know?
>
> A. No, sir.

On redirect at Tr., 391, Mr. Olsen, the surveyor, was asked if he had found any patches on the tank, and he answered:

> A. I don't know of any. Of course I didn't uncover all of the tanks.

On recross-examination this witness testified, Tr., 393, that the "ballast tanks are covered with wood ceiling, about two and a half inches thick, as a rule," and that he never had any of those tanks uncovered. At Tr., 394, that at a subsequent survey he found a leak in No. 3, and says that this leak was not found until after they had cleaned around where it existed. "It was not leaking before, I didn't find the leak before it had been scaled, it had been covered with a whole lot of dirt and scale and foreign matter which had accumulated around there." At Tr., 395, speaking of this leak that he found, after an evidently indifferent character of inspection, says that this leak was not serious then as the water would go down in

the bottom of the ship. "It would have gotten serious if it came up over the tank too, of course."

So, we submit, that the production by the Fort Morgan Steamship Company of Mr. Olsen in the character of a surveyor should avail them little, considering his lack of personal knowledge of the condition of the tanks, and the fact that they would go so far to refer to this so-called survey and do nothing at all to bring in the engineers and the chief officer of that ship, whom it appears were familiar with those tanks and reported on their leaky condition (see full survey report, Tr., 324-327), wherein three surveyors, acting on behalf of Lloyd's within a few days from the return of the "Fort Morgan" to Port Limon, upon the abandonment of her voyage, say:

> "On sounding we found fourteen inches of water in No. 1 tank and upon inquiry as to why this tank had not been pumped full, learned from the Chief Officer and Chief Engineer that this tank had never been filled to its capacity since they had been on the ship, the Chief Officer and Chief Engineer stating that they understood it has leaked when filled."

They also report, officially, that according to the statements of the chief officer and chief engineer, "when vessel sailed from this port at 6 P. M., November 29, 1917, forepeak tank was empty, No. 1 tank contained 14 inches of water, afterpeak tank empty, not in condition to be used for water." The learned counsel for defendants indicate that they are at a loss

what it is petitioners expect this Court may infer from defendants' neglect to put the chief officer and chief engineer on the stand, or some other person in the engineer's department familiar with the condition of those tanks, but to satisfy that curiosity we submit that this Honorable Court has repeatedly held that the failure of a party to produce such witnesses in matters of this kind, or to produce lookouts or helmsmen or deck officers in matters of collision, etc., in the absence of any reasonable excuse for such failure gives rise to the presumption that if those officers or employees were produced that their testimony would not be favorable to the ship.

V.

Defendant, Fort Morgan Steamship Company, Have Seriously Urged That Their Ship Was Abused.

Certain it is that Armour & Co., petitioners, were under no obligation whatsoever to add to, or take from, or do anything of any kind, or nature, to facilitate the ship in providing pens to safeguard the transportation of their live stock. Still further, that defendant, at page 28 of their brief, quote Article 25, Tr., 27, of the bill of lading, as follows:

> "Live birds, or animals and live stock are received at the sole risk of shipper, consignee and/or assigns, the vessel not having any special equipment therefor."

But they forget to tell the Court that at the time that bill of lading was issued all of the cattle had been received on board and had been placed in pens exist-

ing on board, so that the question of suitable cattle pens was not a point under consideration at the time of the issuance of that bill of lading by the master of that ship.

Not only does the contract between Armour & Co. and the Cattle Company, which the Fort Morgan Steamship Company, themselves, have pulled into this case, show that the duty and obligation to provide cattle pens, etc., rest solely and exclusively upon the Cattle Company, and that Armour & Co. were in no way concerned or required to do anything whatever in respect to their putting up; but the testimony of the president of the Cattle Company is to the effect that he, personally, was there and that it was the Cattle Company, and Cattle Company alone, which put up those cattle pens, and that in the execution thereof he employed all the help he could get from whatever source he could secure it, on account of scarcity of labor at Port Limon, and had even paid the master of the Steamship "Fort Morgan" for his services in staying aboard of the ship and helping to look after their proper construction, and so, also, had engaged the services of the gentleman, who would go as supercargo for Armour & Co. when that voyage commenced, but the testimony of Mr. Mitchell, at Tr., 148, shows that this supercargo took that employment for his own account and not for the performance of any service due by Armour & Co.

Certain it is that the bill of lading distinctly provides, at all events, that "animals and live stock are received" by that ship, and in the receipt of that stock by a common carrier there is an implied warranty

that she was prepared to at least take due care during the voyage of goods and merchandise they had so received for transportation.

———o———

We would not have filed this supplemental brief but for the fact that the Fort Morgan Steamship Company have set forward seriously such contentions, which are calculated to create some confusion respecting the real issues.

Respectfully submitted,

John D. Grace,
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Attorneys for Armour & Co.,
Petitioners.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925.

No. [redacted]135

ARMOUR & COMPANY,
Petitioners,

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FORT MORGAN STEAMSHIP COMPANY, LTD., (CLAIMANTS AS OWNERS OF THE STEAMSHIP "FORT MORGAN"); THE AMERICAN SURETY COMPANY OF NEW YORK; AND THE CENTRAL AMERICAN CATTLE CO.,
Defendants.

On Writ of Certiorari to the United States Circuit Court of Appeals, for the Fifth Circuit, from their Final Judgment Rendered March 18, 1924, Affirming the Judgment of the Lower Court.

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MONTGOMERY-ANDREE PRINTING CO. INC., 807 CHARTRES, N. O.

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I.

References to Opinions of Lower Courts in this Case.

This case comes before this Honorable Court on writ of *certiorari* (on petition of Armour & Co.) to the United States Circuit Court of Appeals, Fifth Circuit. The opinion of that Court is published in *297 Federal Reporter, p. 813*, under the title of *Armour & Company v. Fort Morgan Steamship Company*. That opinion was rendered on appeal from a decree by Judge Rufus E. Foster, Judge of the United States District Court, Eastern District of Louisiana. The opinion of Judge Foster is printed at pages 437, *et seq.*, of the transcript. We do not find that it has been published.

II.

LIST OF AUTHORITIES CITED.

Crenshaw v. Pearce, 37 Fed., 432 19
Field Line (Cardiff) v. Sou. Atl. S. S. Line, 201 Fed., 301 21
Grant v. Poillon, 20 Howard, 162 22
National Steam Nav. Co. v. Int. Paper Co., 241 Fed., 861 33
Portland, etc., Co. v. Luckenbach S. S. Co., Inc., 130 Fed., 860 33
Rees v. Barrington, 2 Ves., p. 520 23
Sun Co. v. Philadelphia, etc., Co., 244 Fed., 580 .. 25
The Ada, 250 Fed., 194 26
Luckenbach S. S. Co. v. Gano Moore Co., et al., 298 Fed. Rep., 343 24
The Belfast, 7 Wallace, 642 21
The Hiram, 101 Fed., 142 29
The Wildenfels, 161 Fed., 864 28
Turner v. Beacham, Fed. Cas. No. 14,262 28
W. R. Grace & Co. v. Luckenbach S. S. Line, 248 Fed., 953 27
West Indies Co. v. Chicago, etc., Co., 249 Fed., 339 19

III.

Statement of Grounds of Jurisdiction.

This cause was initiated by a libel filed by Armour & Co. against the Steamship Fort Morgan, in the United States District Court, Eastern District of Louisiana. Claim was filed by the Fort Morgan Steamship Company, Ltd. (our client herein), which, after various exceptions filed, answered and called in the Central American Cattle Co., Inc., which filed answer. After evi-

dence taken and argument had decree was entered dismissing the libel. Armour & Co. appealed to the United States Circuit Court of Appeals for the Fifth Circuit, which affirmed the decree. Armour & Co. then applied for a writ of *certiorari*, attacking the jurisprudence as stated in the opinion of the Circuit Court of Appeals; and this writ was granted.

In its answer our client, the Fort Morgan Steamship Company, Ltd., urged, in addition to the defense on the merits, that the matter was not one of admiralty jurisdiction; being dependent upon a contract of sale with which the contract of transportation relied on is too closely interwoven. On this point Judge Foster said at the close of his opinion (Tr., p. 442):

> "It was also urged on behalf of the ship that the contract between Armour & Company and the Cattle Co. was one of sale as well as transportation, and therefore not cognizable in admiralty. With this also I am inclined to agree."

This point is discussed hereafter under the heading of Argument, Section (b).

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1925.

No. 537

Armour & Company,

Petitioners,

versus

Fort Morgan Steamship Company, Ltd., (Claimants as Owners of the Steamship "Fort Morgan"); The American Surety Company of New York; and the Central American Cattle Co.,

Defendants.

On Writ of Certiorari to the United States Circuit Court of Appeals, for the Fifth Circuit, from their Final Judgment Rendered March 18, 1924, Affirming the Judgment of the Lower Court.

IV.

STATEMENT OF THE CASE.

This was a libel brought in the United States District Court for the Eastern District of Louisiana by Armour & Company, appellant herein, against the Steamship "Fort Morgan." The libel annexed a bill of lading (Tr., p. 9), issued by (Tr., pp. 29, 30) the

Central American Cattle Company, Inc., (the charterer of that ship) in the name of that Company for the transportation of 420 head of cattle from Port Limon to Jacksonville. The libel alleges in substance that, shortly after leaving port, the vessel listed very heavily so as to kill about half of the cattle and seriously damage the rest, the vessel being obliged to return to port and the voyage being abandoned; all this taking place within a few hours after leaving port. The voyage was never resumed and such of the cattle as survived were subsequently shipped by other vessels with which we have no concern.

The libel being *in rem*, and the bill of lading having been issued by the charterer (Tr., pp. 29, 30) and not by the owner (the Fort Morgan Steamship Company, Ltd.) the libel is, necessarily, based upon the familiar lien against a ship (no matter to whom belonging) to secure claims growing out of transportation contracts made by her charterer; a lien similar, for instance, to that which the owner of premises exercises, for unpaid rent, against the property of strangers, lodgers, etc., on the premises. We state this thus specifically because it is of importance in regard to some of the issues in the case.

The shipment and subsequent disaster took place at Port Limon; the loading of the cattle, issuance of the bill of lading and subsequent proceedings having been under supervision of a representative of the charterer, the Central American Cattle Company, Inc., (hereafter referred to, for convenience, as the Cattle Company) and a supercargo employed by Armour & Company (Tr., pp. 233, 239).

All this is stated from evidence developed in the record; our client, the present owner of the Fort Morgan, having had no knowledge of the matter at all; having bought in entire innocence of of even the existence of any such claim or of any of the facts. (Tr., pp. 370, 459.) We do not mention this as having any technical effect on the issues of the cause, but simply as preventing any possible attempt to obscure those issues by any attempt at invective connected with the accident. We mention it, also, because it seems simpler to present the history of the facts as they became known gradually to the new interests, when the seizure of the SS. "Fort Morgan" made it necessary to bond that ship and prepare such responsive pleadings as might be proper.

It may be convenient at this point to dispose briefly of what is much emphasized in the brief of opposing counsel in this Court and was much emphasized in their briefs in other Courts, i.e., the scantiness of testimony (indeed, on both sides), and the nonproduction of logs, etc., as to the occurrences on this very brief voyage of the Fort Morgan.

We have never understood, nor have opposing counsel explained, just what inference they seek to have drawn from this state of the record; and counsel do not make the matter clear in their brief in this Court, stating on page 34 that they "leave to your Honors to determine what inference arises therefrom."

Any sinister inference would be difficult for the reason not only that Armour & Company had on board on the trip in question a supercargo, Mr. Wilkinson, (they took no evidence until after he died, Tr., p. 147), but also their counsel produced and filed (Tr., p. 188,

libelant's exhibit "C 2") a document which contains very full statements signed by all on board, in the presence and at the instance of port authorities. As to the logs, etc., no call was made for them and without such call they would not have been legal evidence in our favor. As will be seen by the story of the developments hereinafter, it took time for the new purchasers of the Fort Morgan to discover the real facts, and in the meantime, before the cause was at issue, the officers had disappeared (Tr., p. 395). But their disappearance was of no importance as the testimony of the master (Tr., pp. 229, *et seq.)*, covers all the occurrences on the ship and is entirely undisputed; and, as above stated, Armour & Company knew fully all the facts through their supercargo, Mr. Wilkinson, and had before them and put into the record full statements of all on board. In fact, the issues in this cause do not consist of disputes as to occurrences on the voyage in question, nor, indeed, to any substantial extent of disputes of fact at all. The undisputed story is entirely sufficient.

Stated briefly, the real story as it was gradually discovered by the new purchasers of the Fort Morgan began with a certain agreement of October 3, 1917 (Tr., p. 78), a month or so before the occurrences in question, between Armour & Company and the Cattle Company whereby the Cattle Company was to sell to Armour & Company 25,000 head of cattle in South America (beginning with 1100 head), take the cattle to Port Limon and transport them from Port Limon to Jacksonville, the Cattle Company stating in the agreement (Tr., p. 80) that it would charter ships to enable it to do so.

The Cattle Company then chartered the Fort Morgan under a charter (Tr., p. 70) bearing the title "Time Charter—West Indies Fruit Trade," having a clause therein (Article 11, Tr., p. 76) permitting the erection of a light fruit deck to carry a load of fruit, naturally a light weight. The Cattle Company took the Fort Morgan to Port Limon, and there, under the supervision of its representatives and of a supercargo employed by Armour & Company, heavy cattle were loaded on a deck authorized only as a fruit deck (Tr., p. 233, p. 313) and the ballast tanks of the ship, obviously intended as such (Tr., p. 377) (the charter described the ship as having water ballast, Tr., p. 71) were transformed into fresh water supply for the cattle (Tr., pp. 254, 337), with the consequence of diminution of ballast in accordance with the needs of the cattle and not the requirements of the ship.

Desperate attempts were made in the testimony and argument to free Armour & Company from complicity in these proceedings; but the fact remained that Armour & Company, by its agreement, had arranged with the Cattle Company to charter and equip ships (Tr., p. 80); that it was accordingly bound to notice of the charter and that the proceedings were contrary thereto, and that the master had no authority to vary the terms thereof. And its own supercargo was present throughout and had the water drawn for the cattle (Tr., p. 337). It is useless, therefore, to dwell on the point that that supercargo actually supervised the deck erection (p. 233), or the claim that *quoad* that point he was hired by the charterer (Tr., p. 402), or on the fact that the master was paid fifty dollars for his participation. All knew of what was being

done and all were bound to know that it was contrary to the charter.

Desperate efforts were also made to show that this sudden "unseaworthiness" of the Fort Morgan, with her new deck and converted ballast, was really due to leaks in the ballast tanks. Considering that the tanks were and had been filled, used and part emptied for the use of the cattle, and no one mentions seeing a leak, this claim was rather belated; but it was set at rest by the testimony of Mr. Olsen, who put an end to all previous surmises and rumors by examining the tanks. There was no leak (pp. 375, 376).

But these discoveries paled beside the further discovery, verified by an examination of the records of the Civil District Court of the Parish of Orleans (disclosing a suit hereinafter discussed), that the allegations of the libel as to what had passed between Armour & Company and the Cattle Company and as to the situation and alleged losses of Armour & Company were very far, indeed, from reflecting the true facts.

As above explained, the claim in the libel against the ship was necessarily based on the principle of admiralty law that a ship, no matter to whom belonging, is a pledge to secure the payment of obligations of the charterer to shippers; and it was, therefore, of vital importance to the owner of the ship that the relations between charterer and shippers, of which the shipowner (especially because a recent purchaser) could know nothing directly, should be set out fully and frankly. According to the libel, the contract between shipper and charterer was simply a bill of lading issued by the charterer in its own name; the shipper

being the owner of about 420 head of cattle, and having suffered losses by the disaster consisting of a large part of $16,800, the alleged shipping value of the cattle, plus $10,500 of freight, which the libel alleged had been paid. As the bill of lading annexed stated (Tr., p. 28, foot of page) "freight prepaid," this allegation meant that the freight had been paid in advance; but it is useless to refine on that point, as in fact, it had not been paid at all.

Opposing counsel strenuously urged that we should be forbidden to search into the real facts; his position apparently being that a ship is bound by any fictitious situation a charterer and shipper might claim to exist between them. Adherence to this position, which would be equally unfounded in law and good conscience, became impossible, however, as the matter continued to develop. Attempt to prove payment of freight resulted in an answer by libelant's first witness that it had not been paid before sailing (the stipulated time) and finally that it had not been paid at all, but had been "settled by a compromise agreement with the people with whom we had contracted for this cattle." (Tr., p. 111.)

It was thus made impossible to avoid looking into this settlement and into the original contract on which based, which was the original October contract for sale and transportation to which we have heretofore referred in relation to its provisions that the Cattle Company should charter ships and that the Cattle Company (not the ship-owner) should transport the cattle; and in respect to the notice it thus gave Armour & Company that any ship would be a chartered ship,

dealings with which must be limited by charter provisions.

We now refer to that contract, thus brought into the testimony, in connection with said settlement (before this litigation was begun) of the controversy growing out of the disaster in question; and especially, in connection with that settlement, to the provisions thereof as to payment of price and freight.

If Armour & Company had made these payments at the stipulated time, that is, when the voyage began, it is quite true that Armour & Company when the disaster occurred would have been in the financial situation of having paid out $16,800 to the charterer for the cattle, and $10,500 freight, or a total of $27,300, against which, if the voyage were considered as abandoned, Armour & Company would have had on hand at Port Limon the cattle which had survived the disaster. And the same would of course have been true as to their financial position if Armour & Company, having in fact made no payments at all at the time of shipment, had thereafter, in the settlement hereinabove mentioned, paid the $27,300 and received no benefits; although, of course, any claim of right to thus act retrospectively and retroactively at the expense of the absent shipowner and create a lien on the ship long after the voyage would hardly seem to require serious consideration.

The libel substantially averred the first of the above suppositions, averring ownership of the cattle in Armour & Company, by claiming that Armour & Company had suffered the damages alleged, and specifically averring that freight had been paid, annexing a bill of lading stating that it was prepaid. When it

developed by the mouths of libelant's own witnesses that these statements were not true, its Chicago counsel, Mr. W. C. Kirk, took the stand (Tr., p. 168) in attempted explanation, and claimed that while it was true that at the time of the disaster and thereafter up to the time of the settlement Armour & Company had paid nothing and suffered nothing, yet that in the settlement, it had repented and paid then as if it had paid on shipment; thus attempting to treat the matter of settlement as not a settlement, but a mere question of date of payment, claiming that it simply constituted doing later (regardless of acquired knowledge and interests of others) what might have been done at the time of shipment.

Without discussing legal difficulties, it will be enough to point out that neither of these propositions (that is, neither the account given in the libel nor the theory of Mr. Kirk) accords with the facts. As to payment at the time of shipment or of the disaster, the libel is, of course, entirely inaccurate. Armour & Company had paid at that time neither price nor freight and had suffered nothing. As to the settlement, if it had consisted in Armour & Company paying $27,300 (the $16,800 price and $10,500 freight) and receiving nothing, it is true that it would have put them in the same *financial* situation as if these payments had been made at the time of shipment, except as to the matter of interest. To claim that it would have put them in the same *legal* situation; that making payments after a disaster and the abandonment of a voyage, without the knowledge or consent of the ship concerned, would have put them in the same relation to the ship as if these payments had been made innocently and in contemplation of the voyage is a claim

which we should not have imagined could be urged if it were not evidently the contention of our opponents. But it is useless to discuss it, as it is not true that Armour & Company, in the settlement, paid out $27,300, and it is not true that in the settlement Armour & Company received nothing.

On the contrary, the evidence developed that the situation at the time of the settlement was that the Cattle Company, having received nothing, had brought suit against Armour & Company for $35,805.50 (Tr., p. 460) made up of $17,315.10, price of cattle, $10,500 freight and $7990.40 damages on account of expenses in connection with the remaining 680 cattle out of the 1100 head which Armour & Company had agreed (by the agreement of October 3, 1917) to take and pay for.

Armour & Company either because of the facts as shown by the evidence in this case, or possibly because of further facts known only to Armour & Company and the charterer (Armour & Company took no evidence, until after their supercargo, Mr. Wilkinson had died, Tr., p. 147) did not fight the case to a conclusion, but made an agreement to pay $19,000, which if attributable to that account alone, would mean that a deduction was made of $16,805.00 from the amount sued on; in settlement of the very claims it is now making.

But the deduction was in reality larger. The $19,000 was not paid solely in settlement. Armour & Company's Chicago counsel testified that one motive for making the settlement was that otherwise deliveries of cattle would stop; and the settlement agree-

ment reflects that fact (p. 183), as the $19,000 was to be paid, one-half on the sailing from New Orleans and the other half on the sailing from Port Limon of the first of the new ships. Attributing only half of the $19,000 to this consideration and accordingly figuring $9500 as paid in connection with the shipment settlement, would leave, deducting that figure from $35,800, a total of over $24,000 of deductions obtained by Armour & Company in settlement of the very claims it is now making against the ship (taking into consideration about $2000 on account of the fact that the Cattle Company was given a half interest in the remaining cattle).

But amounts are really unimportant; the important fact being that a settlement was made which was expressly final; the parties so regarding it, to such an extent that from that time to this Armour & Company have made no claim against the charterer, the Cattle Company, which had participated in the settlement, even when we afforded every opportunity by calling in that Company under Rule 59 in Admiralty. The only attack since the settlement has been directed against the ship, which was not informed of the settlement.

As we have mentioned, we called in the Cattle Company under Rule 59 in Admiralty, stating that if by any possibility a decree could be rendered against us in favor of Armour & Company, the same decree should be rendered in our favor against the charterer for its abuse of the ship. That would have been sorry satisfaction, as the proceeding against the Cattle Company was not *in rem*, and it accordingly gave no bond, and the record is silent as to its present financial situ-

ation. But the fact that such a result would flow from a decree against us in favor of Armour & Company is one of the minor points indicating the impropriety of disregarding the settlement; for in that event the net effect of the decree would be simply to rip up a settlement which was deliberately made, Armour & Company having obtained in the meantime all the benefits of the new trade arrangements which so largely formed a motive therefor.

We have gone into this matter at more length than would perhaps seem necessary, for the reason that the fact that Armour & Company were indebted to the charterer for the price of cattle, and the further fact that they had paid no freight, necessarily made the settlement with them of their claims for damage, etc., a matter of deduction and not of payment, which clouds a little, at first glance, the fact of settlement and it was further clouded by the fact that the desire of Armour & Company to make the new trade arrangements made the deduction smaller than it would otherwise have been. If Armour & Company had paid for the cattle and had paid the freight, and desired no new arrangements and a large cash payment had been made to them for their claims, it may be possible that this libel would still have been brought, as the shipowners would not have known of the settlement; but it hardly seems possible that it would have been pressed after the shipowners had discovered the facts. The passing confusion injected by the mode of settlement and the inclusion of the new trade arrangements probably account for insistence of hope; in the face, however, of the fact that no explanation or answer concerning the settlement has been suggested other than the manifestly unsound one mentioned above; an ex-

planation unsound in law and far from accord with the figures.

In the Court below opposing counsel said little on the matter of settlement, little on the question of the abuse of the ship and nothing on jurisdiction; dealing at great length with details of the disaster, and meeting the issues of settlement, abuse of the ship, and jurisdiction, with significant silence.

In this Court much the same course has been followed, with the exception that there is now an exceedingly belated admission (p. 45) that the claim for freight was in error and libelant in fact now claims only $15,752.01 (brief, p. 44) instead of $31,500 (Tr., p. 5) or $28,450 (Tr., p. 7). If libelant were really entitled to recover anything, these errors as against a new purchaser having no knowledge whatever of the matter, might have had serious consequences if not discovered in time by it.

V.

ARGUMENT.

(a) Contract (October 3, 1917) and settlement (January 18, 1918).

Libelant's counsel took the position, throughout, in objections to testimony, and in briefs and argument below, that the contract for the purchase and transportation of the cattle in question and the settlement thereof had nothing to do with the case. That was rather an extraordinary position as a matter of law, as it would make a ship (belonging to a third party) a pledge, not for valid, genuine and subsisting obli-

gations of its charterer, but for whatever obligations, originally fictitious or subsequently settled, might be made up as against the ship between the charterer and any shipper. For instance, if there were (as counsel seems to claim) a lien for the return of prepaid freight in case of disaster, and the bill of lading had not contained the provisions on that subject which it does contain, a ship might be held liable for the return of freight which had never been in fact paid to the charterer, or had been paid after disaster. But we need not analyze the situation farther for when it became necessary for counsel to take his evidence he found it utterly impossible to maintain any such position. At Chicago counsel produced his main witness, Mr. Munnecke, the manager of the department in charge of this matter. At the very beginning (Tr., p. 110) counsel asked the following question and received the following answer:

> Q. As a result of any contract or agreement that was made, did the Central American Cattle Co. deliver any cattle for account of Armour & Co.?
>
> A. They delivered them to the steamer, if that is what you mean. They did not complete delivery. We contracted for the delivery of this cattle at Jacksonville, Fla. They delivered them to the steamer at Port Limon.

And on page 111 the following question and answer occur on direct examination:

> Q. As a matter of fact, has the freight been paid?
>
> A. Well, the freight—it was not paid, no; but it was later settled by compromise agreement with the people with whom we contracted for the cattle.

On cross-examination we asked Mr. Munnecke (Tr., p. 121) to what agreements and arrangements he had been referring, and after considerable discussion between counsel the witness answered (Tr., p. 123) by saying:

> A. I referred only to the original contract.
>
> Q. Of what date?
>
> A. Of October 3rd—whatever date that is in October.

Without considering, therefore, the well-settled jurisprudence that under arrangements of this kind for the carriage of cattle or other goods, whereby ships are to be procured and the goods carried, bills of lading issued at the time of each shipment (even when bills of lading are issued at all) are incidental to the main contract (merely pledging the ship to secure the charterer's obligations) and are to be considered in reference thereto *(249 Fed., 339*, and *Crenshaw v. Pearce, 37 Fed., 434)*, it does certainly seem too plain for dispute that when counsel's witness undertook to testify to a contract and when that witness also undertook to testify to a compromise and settlement, his counsel cannot very well claim thereafter that the contract and the compromise and settlement have nothing to do with the case. It is true that the attempt had been made in the libel to handle the case as if there had been no contract and as if there had been no settlement; but in making the proof it was impossible to keep from discussing these facts. Moreover, the bill of lading annexed to the libel had expressly referred to the contract (Tr., p. 28).

Mr. Kirk, Chicago counsel for the complainant, then testified, stating that the Cattle Company had made

demand on Armour & Company for payment for 420 head of cattle at a price of 5 cents per pound (which would have been $40 per head, the shipping price—see Munnecke, page 10), and $25 per head freight (which would have been $10,500), thus making a total of $27,300. In fact, the Cattle Company had filed suit and the petition, of which we filed a copy in this case (Tr., p. 460) shows that there were additional claims on account of expenses, making a total of $35,805.50.

Mr. Kirk stated that he was at first of the opinion that the charterer might not be able to collect this amount from Armour & Company "because of the fact that under the agreement they were to charter and equip a suitable vessel." Mr. Kirk does not say whether he ever became convinced of any error in this position as a matter of law, or whether he ever became convinced thereafter one way or the other on the issue as to whether the vessel was suitable or if bad, how it had become so, and the connection of Armour & Company thereunto.

In this situation Mr. Kirk, who was necessarily confronted with these possibilities, and, moreover, actuated by a desire to obtain certain important trade agreements, compromised the case, receiving a very large deduction from the total claim and securing the trade arrangements which have doubtless been carried out and from which it is to be supposed (it was the general history in war times) large profits were reached. Having thus compromised and settled the issues, the attempt to hold the ship as a pledge as if they had not been settled seems to require no long discussion. If the attempt had been made by a suit

against the charterers seeking to repudiate the settlement while holding on to the valuable trade agreements for the future, it would have been sufficiently inequitable; but being an attempt at repudiation by asserting against a pledge belonging to a third party, claims which had been settled, its chances of success manifestly rested only on the chances of continued ignorance of the owners, first as to the abuse of the ship, and second as to the settlement.

That our statement of the legal principles is correct needs few references to prove. That the charterer is the contractor for carriage and that under bills of lading issued by the charterer the ship is the pledge to secure these obligations with the condition that they must be real and still existing obligations, was explained as long ago as *"The Belfast," 7th Wallace, p. 642.* And it is hornbook law and indeed inevitable in reason that compromise and settlement of a principal obligation releases all sureties and pledges.

References, such as were made below by counsel, to such cases as *Field Line (Cardiff) v. South Atlantic S. S. Line, 201 Fed., 307*, merely confuse the matter. Question sometimes arises, as in such cases, as to whether a master in signing, does so, *quoad* shippers, on merely the charterer's behalf (because obligated by the charter to sign bills of lading) or also on behalf of the shipowner, thus creating a personal liability of the shipowner. Such cases, while not always expressly so stating, are cases, as we understand it, where the master has simply signed the ordinary ship's bill of lading, simply signing as master. It is hard to see how there could be doubt in such a case as the present where the master expressly signed for the charterer,

and used the charterer's bill of lading with its name on it. But we say that such references merely confuse the matter because this is not a suit *in personam* against the shipowners, and what the Court has to deal with is simply the lien against a ship given by the maritime law to secure the contract of transportation and claims thereunder. Where such claims are unfounded, or have been settled, the point is that a lien to secure them could not have existed or has ended. *Sublato fundamento cadit opus.*

If it were possible (and it is not) to consider the settlement in any other light, it would not help libelant. If all statements in the document as to settlement were obliterated, as well as all testimony to that effect, it would still be impossible to claim that by a payment made months after the whole matter had terminated and the vessel had returned to New Orleans, and our clients had innocently come into the matter, Armour & Company could obtain a lien of any kind against the ship; and except in that settlement they did not pay and have never paid a single cent.

The counsel seemed to appreciate this difficulty, as in his brief below, after elaborately insisting upon eliminating the contract and settlement, confining the matter to the libel, he asked that the Court give him an opportunity to prove his damages thereafter. That was an extraordinary proposition. No such agreement or arrangement or stipulation had been made, and counsel had had full opportunity to prove his damages, if any recoverable damages existed. The plain fact seems to us to be that if counsel eliminates the contract and settlement he cannot possibly claim any damages whatsoever, for the simple reason that the

testimony develops that up to the time of the settlement in question, and except as contained in that settlement, Armour & Company never paid out a cent and were not damaged at all; and if they had simply let matters alone that situation would have continued, but, as Mr. Kirk says, for business reasons they concluded to pay out a considerable amount of money to the cattle company. That was their privilege, but such a transaction, long after the entire voyage in question had been abandoned and the Fort Morgan had returned to New Orleans (and our clients had innocently bought in), could not possibly affect adversely the situation of the Fort Morgan or its owners, or create a lien upon that ship. "For it is," said Lord Loughborough in the leading case of *Rees v. Berrington, 2 Ves., p. 520*, "the clearest and most evident equity not to carry out any transaction without the privity of him who must necessarily have a concern in every transaction with the principal debtor. You cannot keep him bound and transact his affairs (for they are as much his as your own) without consulting him."

(b) Jurisdiction.

This point is, of course, intimately involved with the discussion which has just preceded. If counsel could have succeeded in keeping the contract and settlement out of the case, the situation upon the issue of jurisdiction might have been very different. As appears from the opinion in the *Ada case, 250 Federal, page 194*, as well as by the old cases of *Grant v. Poillon, 20 Howard, 162*, and *Turner v. Beachem*, Federal Cases No. 14,252 (Mr. Justice Taney, afterwards Chief Justice), admiralty is very sensitive as

to the entire purity, in the maritime sense, of the contracts with which it will attempt to deal, and (as said in the first case mentioned), a contract of sale will taint an entire contract and take away the admiralty power even to enforce the provisions relative to charter; and to be enforceable a contract must be wholly maritime; and, as said in the last-mentioned case, even although a contract be maritime, yet if it has been so blended with another, not maritime, that the Court cannot decide one with justice to both parties without disposing of the other, the Admiralty Court cannot take jurisdiction. See also *Luckenbach S. S. Co. v. Gano Moore Co., et al., 298 Fed. Rep., 343.*

The contract in this case, so far from being a pure contract of transportation, so closely resembled a mere contract of sale that Munnocke, libelant's manager, described it on page 4 of his testimony, instinctively, as a contract to deliver these cattle at Jacksonville; evidently meaning a sale of cattle deliverable at Jacksonville. The basis for this statement, of course, was that while the cattle company engaged to deliver the cattle in the technical sense at Port Limon, the cattle company was nevertheless to proceed to carry them to Jacksonville (the contract containing elaborate provisions as to transportation); and, moreover, the delivery at Port Limon was necessarily to be, as Mr. Kirk points out, on a vessel suitable for the carriage of this cattle to Jacksonville. Armour & Co. were careful not to agree that such delivery could be made by putting the cattle on the wharf at Port Limon. They were anxious, evidently, to tie up the contract of sale with the contract of transportation.

Even if the bill of lading were considered entirely by itself (which would be extraordinary, as the contract and bill of lading are both in the name of the cattle company, and made by it, and both contain provisions governing the transportation), the elementary law is that the ship is pledged as security simply for whatever might be due the shipper for failure to carry out that contract made by the cattle company and evidenced by the bill of lading. It would be plainly impossible for the Court to fix any such figure (if such liability did exist) without considering both the contract and settlement to which we have referred. The witnesses found it impossible, at Chicago, and dragged in the contract and settlement with every breath. Not a cent was paid by Armour & Co. except in pursuance of the settlement and of the terms thereof. The cattle were subsequently handled in accordance with that settlement. And as to the contract, neither the bill of lading (which expressly refers to the contract as for rate of freight), nor the settlement, can be considered without referring to and construing the contract; for the simple reason that the settlement was based upon the contract, and, as Mr. Kirk expressly states, in considering whether to make the settlement he considered the terms of the contract.

It is very plain, therefore, that what is before the Court is an issue as to a mingled contract of sale and transportation, and as to a lump sum settlement made of such contract; and we submit that it is plain that no such issues can be handled by the Court under its maritime jurisdiction. Mr. Terriberry, counsel for the Cattle Company, evidently appreciated this point, as he sued in the Civil District Court.

This subject is fully treated in the above mentioned case *(supra)* of *"The Ada," 250 Fed., p. 194,* wherein the Court of Appeals (New York) reversed the District Court, pointing out, on page 196, that "All the provisions of the agreement show that the main intention was a contract of sale" and that a contract of sale, even of a ship, is not enforceable in admiralty and taints the entire contract and takes away the admiralty power even to enforce the provisions relative to charter.

The Court added: "It is well established that a contract enforceable in admiralty must be wholly maritime." *Grant v. Poillon, 20th Howard, 162.* In that case it was held that the master and part owner could not maintain a suit in admiralty for freight against shippers with whom he was a partner, because a partnership contract would have to be settled. In *Turner v. Beachem, Fed. Cases No. 14,252,* Mr. Justice Taney held to the same effect, saying:

> "And I consider it to be a clear rule of admiralty jurisdiction that, although the contract which a party seeks to enforce is maritime, yet if he has connected it inseparably with another contract over which the Court has no jurisdiction, and they are so blended together that the Court cannot decide one with justice to both parties, without disposing of the other, the party must resort to a court of law, or a court of equity, as the case may require, and the admiralty court cannot take jurisdiction of the controversy."
>
> See also the very late case of *Luckenbach S. S. Co. v. Gano Moore Co., et al., 298 Fed. Rep., 343.*

(c) Abuse of the Ship.

As we have stated, the agreement between Armour & Company and the Cattle Company provided expressly that the Cattle Company would carry the cattle from Port Limon to Jacksonville, and that it would charter ships for that purpose. Accordingly, Armour & Company were put on notice that any ship used would be a chartered ship and were bound to see to it that what was done should be within the rights given by the charter.

Therefore, the Fort Morgan, in pursuance of this agreement, was chartered by the Cattle Company. We may mention in passing, for the sake of exactness, that the charter was not directly from the Fort Morgan Steamship Company, the owner (pp. 350, 355), but it was practically so, as it was testified (Tr., p. 361), that the intermediary, the Gulf Coast Plantation Company, was practically the same as the Fort Morgan Steamship Company. (See *248 Fed. Rep., p. 953.)*

By the agreement above mentioned (Tr., p. 80), Armour & Company were put on notice that any ship provided would be a chartered ship. They were bound to take notice of the charter. The charter was specially pleaded in the answer and it was pleaded that the changes made for the purpose of carrying live stock were unauthorized by the charter. The charter was proven by the Los Angeles testimony. (Tr., pp. 351 and 458.) It is headed "Time charter West Indian Fruit Trade" and contained a provision (Article 11, Tr., p. 76), "That the steamer shall be provided with loose planks, two to two and one-half inches thick to make a platform or deck, all through the vessel's hold, and also provided

with beams for such temporary platform or deck to rest on, BUILDING THE SAME STRONG ENOUGH TO HOLD TIERS OF FRUIT" (capitals ours). And it may be added that the bill of lading issued contained this provision (Article 25, Tr., p. 27), "Live birds or animals and live stock are received at the sole risk of shipper, consignee, and/or assigns, the vessel not having any special equipment therefor." As the ship was not a common carrier, all such conditions were valid as written.

The Cattle Company (see *The Wildenfels, 161 Fed., 864)* and Armour & Company nevertheless proceeded, at their own risk, as we take it (see *244 Fed. Rep., 580)*, to alter the ship by considerable constructions of cattle deck and pens. The importance of the provision that the temporary deck should be "strong enough to carry fruit" in connection with the present case lies in the fact that fruit is a light cargo and placed so high the ship would not affect its stability, whereas cattle are quite different. Captain Olaf H. Olsen, a well-known expert, who has represented the Norwegian Veritas for many years, testified as follows (Tr., p. 379):

> Q. What would be the effect of loading them (the fruit decks) with cattle in place of fruit, on the stability of the ship?
>
> A. The ship will be cranky and apt to heel over.

Moreover, the ship is particularly described in the first article of the charter-party (Tr., p. 71) as "having water ballast." This is important, in view of the claims in the various letters, protests, etc., that were filed on behalf of libelant that the ship should have (in addition) fixed ballast if ever to be again so used;

(see *The Hiram, 101 Fed. Rep., top of p. 142)* and, further, in view of the fact that under the conversion made under the agreement between the Cattle Company and Armour, her water ballast tanks were changed in their purpose from ballast tanks to cisterns from which to draw water for cattle.

The excuses for these performances are, first, that Burge, the then president of the Fort Morgan S. S. Company, knew, in a general way, that the ship was to be used for cattle, and second, that the master approved. As to the first we do not represent Burge, who, as appears by his own testimony, sold to the present stockholders the stock of this company without telling them of this litigation. (Tr., pp. 370 and 459. Even as against Burge, his mere general knowledge that planks were to be taken aboard and the ship used for cattle, could not well be taken as evidence of consent to a parol change in the charter or an assent to the changes made; but surely our clients cannot be considered as in any way, either in equity or in law, bound by parol variations claimed to have been based on undisclosed knowledge of their very reticent vendor. It is quite enough to seek to bind them by the contracts which the Company had made. They are certainly entitled to stand by the charter, Armour & Company being bound to know, as above stated, that the ship was a chartered ship, and, indeed, as all the Chicago testimony discloses, being very well acquainted with the whole affair and well knowing that the Cattle Company owned no ships. Moreover, there is not even a claim that Mr. Burge knew that cattle would be loaded on the fruit deck or the ballast tanks depleted for the cattle.

As to the assent of the master, inasmuch as he was hired (see testimony of Whilden, page 402), to assist in the work, that feature is out of the case. He had no authority in any event to agree to changes in the ship or the charter; but when he undertook to serve two masters, he could certainly no longer commit one of them as against the other. We may add that the ship was thereby deprived of her only friend, as it will appear from Mr. Whilden's testimony (page 410) that the various officials, whose names adorn the statements filed (but who did not try to testify), were, with one exception, employes of the United Fruit Company, whose manager is a director of the Cattle Company. The United Fruit Company finally appeared as the purchaser of part of the cattle (Tr., p. 136); a variation in their business not accounted for.

To resume the narrative, Armour & Company and the Cattle Company, after altering the ship as aforesaid to suit their purposes, and hiring the master to assist, set sail and met with early disaster.

There is absolutely nothing to show that there was anything the matter with the ship, leaving out of question the additions placed on her by the charterers. The testimony of Captain Olsen, the surveyor (p. 374), shows that the ship was in perfect condition, and there is not one single statement under oath to the contrary. If the master failed to fill the tanks, or emptied the tanks, it would have been, under other circumstances at most, an error of navigation for which the ship, under the bill of lading and the Harter Act, would not have been responsible, for under the charter-party the tanks were described as ballast tanks, and could be filled or emptied at any time, as a matter of judgment

in navigation. (Tr., pp. 378, 274.) But in this case the tanks had been converted by the scheme of the Cattle Company and Armour & Company into cisterns for cattle, and the master had been silenced by being hired to supervise the work of building the extra deck.

As to the rumor (there is not one word of testimony) that one of the tanks had been leaky, we produced the testimony of Captain Olsen, the surveyor, pp. 374, *et seq.*, who testified that the tanks were in entirely good condition. This was a survey which these rumors, indicated in letters, etc., in the file, suggested ought to be made; and when made it killed that rumor. We call it a "rumor" for there is not one word of any one under oath stating a leak existed, nor of any one stating that he heard any one admit that a leak existed. As heretofore explained, the officers other than the master had disappeared long before the case was at issue and all attempts to trace them failed; but the master and Mr. Burge testified very fully, denying the alleged leak, and the master stating (Tr., p. 292), and there is no contradiction, that this was the first voyage of the officers who were claimed to have said that such a leak (alleged to be a small leak near the top of one tank) "had always existed." The charge of fault in tanks was a plain and desperate afterthought, in the hope of still more misusing the unfortunate ship, and we note that not one of the persons who are said to have heard the alleged admissions have ever been asked to testify.

(d) Special Stipulations and Quantum.

In view of what we have said above as to the three points (1) Misuse of the ship, (2) Compromise of the contract, and (3) Want of Jurisdiction, it seems idle

to spend much space or time on the discussion of either special stipulations or *quantum*. But as we believe that a brief should cover all points, we mention these points briefly.

As above pointed out, libelant sued on the bill of lading and in any point of view, if he has any claim at all, is bound by its provisions. These provisions are set up in special articles of our answer. Article 22 of the answer, setting up the provision as to ship not having facilities for live stock and no liability therefor, has already been discussed. Article 21 pleads that the provision as to written notice of claim *was not complied with* (see *249 Fed., 588)*, and the testimony so shows. Article 23 gives the ship the benefit of any insurance. The Chicago testimony shows that Armour & Company simply abandoned the insurance on the unfounded theory that the ship had met with no disaster. Article 20 refers to three provisions giving the ship the benefit of the usual Harter Act protection of nonliability for errors in navigation if due diligence is used to make the ship seaworthy. The evidence of Captain Olsen and of Captain Jacobsen shows such diligence and the ship was, in fact, seaworthy, the only real question being as to consequences of the arrangement by charterers and Armour & Company to put in a new deckload of cattle on it and use the ballast tanks for cisterns.

On the matter of *quantum*, the only damages claimed by the Chicago testimony to have been suffered by Armour consisted of three parts, and no more. One of these consisted of the price to be paid for a share in the damaged cattle, long after the shipwreck and with full knowledge thereof, and expenses in taking

care of them. This was a voluntary speculation on the part of Armour entered into after the entire matter with which this suit is concerned was ended. The payment for a share in the injured cattle was, therefore, a new agreement, expressly stated as settling the old one and entering into new obligations which had no reference to the Fort Morgan.

The second item of this Chicago proof consisted of an attempt to attribute a part of the payment to "freight." The attempt to claim that a lien could be created on a ship by such a payment, long after the voyage, is, we believe, unprecedented. We may add, in passing, that if the freight had been in fact paid, then or previously, it would have been irreclaimable, so that a claim for its return could in any event have no foundation. The bill of lading expressly provided that "freight shall not be reclaimed under any circumstances." That clause is entirely good, as decided in *National Steam Navigation Co. v. International Paper Co., 241 Fed., 861;* see also *130 Fed., 860.* If Armour & Company really at the date of settlement chose to pay freight, with the full knowledge they had of all the facts, we can see no imaginable ground on which they could get it back. But the idea that after a shipwreck, an arrangement can, under any circumstances, be made between owners of goods and the charterer whereby the owner can hand in "post-paid" freight and then seize the ship to get it back is a novel idea. Ships have suffered from freight prepaid to charterers, but we have never before heard of the post-paid freight proposition. In the brief filed in this Court we understand the claim for freight is abandoned.

The third and last item of the Chicago testimony is the alleged profit that would have been made. In other words, the excess of estimated destination value over invoice value; this being calmly claimed in face of the express provisions in the bill of lading that the ship should not be liable for anything over the invoice value. (The invoice value was never paid; but it is used as a basis for calculating expected profit.)

We have referred to these points because they would be part of the case if there were any case; but considering that Armour did not pay either freight or price, and, in fact, up to the settlement agreement had paid nothing; considering that this settlement agreement was made after the shipwreck and that every dollar paid out thereunder was paid voluntarily and according to his own witnesses' statement, largely from a desire to get future business; that the contract was a mingled contract of sale and carriage not within admiralty jurisdiction; and that the alleged unseaworthiness, if existing, was the result of unauthorized alterations in the ship, we think that the Court will not be troubled with these additional points, but will feel that the libel must be dismissed on any one of the three main points and the innocent purchasers of Mr. Burge's stock freed from these unwarranted as well as entirely unexpected claims.

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